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Supreme Court of the United States

No. .....

DOUGLAS B. FUGATE, COMMISSIONER, DEPARTMENT OF HIGHWAYS, COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

ARLINGTON COALITION ON TRANSPORTATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

Douglas B. Fugate, Commissioner, Department of Highways, Commonwealth of Virginia, prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fourth Circuit entered on April 4, 1972, and modified on May 9, 1972.

OPINIONS BELOW

The opinion of the court below is reported at 458 F.2d 1323, and is included herein as Appendix A.

The order of the court below granting an injunction pending appeal is included herein as Appendix B.

The opinion of the District Court for the Eastern District of Virginia, Alexandria Division, is reported at 332 F.Supp. 1218, and is included herein as Appendix C.

JURISDICTION

The order of the Court of Appeals for the Fourth Circuit was entered on April 4, 1972, and modified on May 9, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether under the facts of this case the respondents' claims are banned by the equitable doctrine of laches.

2. Whether under the facts of this case the Virginia State Highway Commissioner should be required to comply with the National Environmental Policy Act and conduct a new location hearing for Arlington I-66 pursuant to § 128(a) of the Federal-Aid Highway Act of 1968, where approval for the location and design of the project was given prior to the effective date of either act.

STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions involved are set forth in Appendix D and include the following:

(1) Section 128(a) of the Federal-Aid Highway Act of 1958, 23 U.S.C. § 128(a).

(2) Section 128(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 128(a).

(3) Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332.

STATEMENT OF THE CASE

This is an appeal from an order granting a declaratory judgment and injunctive relief against federal and state officials concerning the proposed construction of a six-mile section of interstate highway (hereinafter I-66) in Arlington County, Virginia. This highway is a part of the Interstate System of Highways authorized by 23 U.S.C. § 101, *et. seq.* Pursuant to this statute the highway is constructed by the States under a federal grant whereby 90% of the cost is paid by the Federal Government and 10% by the States (Stip. (1), App. 47). The section of I-66 in question, as planned, is to be constructed in a corridor connecting I-495 and the Theodore Roosevelt Bridge.

A public hearing was held in 1958 to consider a corridor for the highway (Stip. (2), App. 48). The present location was approved by the Bureau of Public Roads (predecessor to the Federal Highway Administration) in 1959 (Stip. (3), App. 49). Right-of-way authorizations which commit federal funds for right-of-way acquired pursuant to authorization, were given for the entire length of the corridor between January 12, 1961 and January 11, 1965 (Stip. (7)(a), App. 52). Design approvals were given for the entire project between June 23, 1961 and August 7, 1968 (Stip. (9), App. 54).

Beginning in 1958 and continuing to the present there has been extensive newspaper coverage in the locality of the I-66 project, and the general route has been published on many occasions since that date. The Arlington County General Land Use Plan has shown the location of I-66 since 1961; and Arlington County's planning with respect to zoning, traffic, utilities, etc., has relied upon this location. In addition numerous businesses have relocated in reliance on the present location (Stip. (11)(d), App. 57).

As of January 31, 1971, more than 924 parcels of land had been acquired in the corridor in question at a cost of $28,670,123.07. In this corridor 94% of the 619 dwellings have been acquired, only one of the 69 businesses remained to be acquired, and 76% of the 628 families and 85% of the 80 businesses caused to be relocated have done so. The estimated cost to complete the acquisition of right-of-way way $5,329,876.93. In addition $1,500,000.00 for preliminary engineering has been expended (Stip. (8), App. 54).

In February, 1971, the respondents filed suit in Federal District Court for the Eastern District of Virginia, Alexandria Division, requesting that right-of-way acquisition and construction with respect to I-66 be enjoined on the bases, *inter alia:*

(1) an environmental impact statement should be filed pursuant to § 102 of the National Environmental Policy Act of 1969.

(2) a 4(f) statement should be filed pursuant to § 138 of the Federal-Aid Highway Act of 1968.

(3) a new location hearing is required to consider the *environmental* effects of the entire project.

(4) a new location hearing is required to consider the *economic* effects of the expansion of Routes 29-211.

The Commissioner denied all allegations and in addition asserted the defenses of sovereign immunity, lack of federal question and laches. The District Court found for the defendants on the merits and dismissed the action.

An appeal was taken to the Court of Appeals for the Fourth Circuit, raising all of the aforementioned issues. In reversing and remanding the case the court found in favor of the appellants-in-error as to the substantive issues and

against the Commissioner, both as to a lack of federal question and laches. Inasmuch as the Commissioner intends to file an environmental impact statement and a 4(f) statement and intends to conduct a hearing to consider the economic effects of the expansion of Routes 29-211, these issues are not before this Court. The Commissioner raises only the questions of the requirement of a new location hearing for the entire project to consider the environmental effects and the denial of the claim of laches.

ARGUMENT

A.

Laches

The court below in discussing the doctrine of laches found the requisite elements for its invocation; however, it declined to assert it against the appellants therein:

> "Nevertheless, we decline to invoke laches against appellants because of the public interest status accorded ecology preservation by the Congress." (App. 7)

In effect the court has declared that as a matter of law laches cannot be a defense in ecology cases. We submit that this is in error.

In declining to permit the defense of laches in an environmental suit, the court has once again advanced the cause of environmental protection at the expense of every other Congressionally-declared public interest. Apart from an interest in avoiding the inordinate expense and wastage of road user funds, there is also a significant public interest as expressed by Congress in the early completion of the Interstate System of Highways. 23 U.S.C. § 101(b), provides:

> "It is hereby declared to be in the national interest to accelerate the construction of the Federal-Aid Highway System, including the National System Of Interstate and Defense Highways, since many of such highways, or portions thereof, are in fact inadequate to meet the needs of local and interstate commerce for the national and civil defense.
>
> "It is hereby declared that the prompt and early completion of the National System of Interstate and Defense Highways, so named because of its primary importance to the national defense and hereinafter referred to as the 'Interstate System' is essential to the national interest and is one of the most important objectives of this Act . . . ."

The court, however, made no mention of these interests, much less, gave to them any weight.

It is significant that no other court in the consideration of a claim of laches has used this approach. In those cases where the defense of laches has not been sustained, the denial has been due to a finding that there was due diligence in bringing the action or that there was not substantial prejudice to the defendant, or both. See *Nolop* v. *Volpe*, 333 F.Supp. 1364 (S.D. S.D. 1971); *Harrisburg Coalition* v. *Volpe*, 330 F.Supp. 918 (M.D. Pa. 1971); *Elliot* v. *Volpe*, 328 F.Supp. 831 (D. Mass. 1970); *Pennsylvania Environmental Council* v. *Bartlett*, 315 F.Supp. 238 (M.D. Pa. 1970), *aff'd* 454 F.2d 613 (3rd Cir. 1971); while two cases involving the defense of laches in a claim pursuant to NEPA have sustained the defense: *Lathan* v. *Volpe*, 455 F.2d 1111 (9th Cir. 1971); *Clark* v. *Volpe*, 4 ERC 1254 (E.D. La. 1972). See also, *Road Review League* v. *Boyd*, 270 F.Supp. 650 (S.D. N.Y. 1967).

In summary it is submitted that there was undue delay on the part of respondents in bringing this action and that the petitioner has suffered prejudice thereby. Accordingly,

this case should have been dismissed pursuant to the equitable doctrine of laches.

B.

Applicability Of § 102 Of NEPA And § 128(a) Of Federal-Aid Highway Act of 1968.

The court below, in defining the test to be applied for a determination whether the National Environmental Policy Act (NEPA) and the amendments to the Federal-Aid Highway Act of 1968 will be applicable to ongoing highway projects, stated:

> (1) "We believe that Arlington I-66 has not progressed to the point where the costs of altering or abandoning the proposed route would *certainly* outweigh the benefits that might accrue therefrom to the general public." (App. 7-8) (Emphasis in the original.)
>
> (2) ". . . (D)oubt about whether the critical stage has been reached must be resolved in favor of applicability." (App. 10)

It is respectfully submitted that the test adopted by the court provides an uncertain and unworkable standard.

In adopting the "certainly outweigh" test, the court has chosen to reject the arbitrary cutoff dates approach applied by other courts in determining whether NEPA should apply to projects ongoing as of January 1, 1970, the effective date of the statute. By this approach, the court has apparently intended to reject a rule of thumb in favor of a rule of reason, assessing each case on its facts and determining from those facts whether striking the balance in favor of application of the environmental statutes, with the concomitant delay and expense, would be appropriate. Petitioner respectfully submits, however, that by attempting to implement this approach through the language previously quoted, the

court as a practical matter has been equally as arbitrary as had they chosen to utilize cutoff dates. The court's opinion states simply:

> ". . . [W]e have compared *all* of the steps already taken towards construction of Arlington I-66 with *all* of the steps yet to be taken and have concluded that this highway has not yet reached that state of completion that cuts off application of Section 102(c)." (App. 12) (Emphasis in original.)

No criteria are offered by the court for this conclusion; it is impossible for States and federal agencies to assess other projects with any measure of confidence to determine the applicability of this decision. Indeed, the "I know it when I see it" approach taken by the court can only result in extensive and unnecessary litigation over every ongoing project, resulting in delays which Congress certainly never intended or envisioned in enacting the environmental statutes. While money may be no object when natural resources are at stake, it must not be forgotten that in many major ongoing projects, such as Arlington I-66, much more than mere dollars are involved. A case such as this, where many families have been uprooted and relocated, where county, state, and private planning has relied on the completion of the highway as proposed for 13 years, where the right-of-way already purchased, unless utilized for transportation purposes, cuts a naked and useless swath through an urban area, requires more judicial explication than mere fiat of the reasons for the court's ruling.

Furthermore, the "certainly outweigh" test by its own terms indicates that its operation cannot result in anything but another arbitrary cutoff point. Even without resolving all doubts in favor of applicability, the "costs" and "benefits" referred to by the court are simply not susceptible

of measurement, especially when the costs must *certainly* outweigh the benefits. It is a comparison between apples and oranges: who can say *which* costs are relevant and *which* benefits are real? Should social costs as well as economic costs be considered? Is a traffic jam a social cost? Is the elimination of automobile traffic an illusory benefit if no pollution is created through the use of electric engines? Do the costs *ever* outweigh the benefits? Indeed, if they do not in this case, where (as the court found) 93.9 percent of all dwellings, 98.5 percent of all families and 84.6 percent of all businesses have been relocated, where 84.6 percent of all necessary right-of-way has been acquired at a cost of over 28 million dollars in public funds, and where the selection of another location and/or the abandonment of the current one would involve the wastage of that 28 million dollars as well as the expenditure of a higher sum to acquire new property, at today's prices, dispossess and relocate new families and businesses, and nullify the planning of nearly a generation of county residents, perhaps it must be concluded that in fact the costs never outweigh the benefits.

The adoption of such a standard is to decree in effect that all ongoing projects as of January 1, 1970, must be halted, new studies made, new hearings held and environmental impact statements filed. Congress could have intended no such result.

Petitioner does not suggest, however, that the case-by-case approach adopted by the court is not a proper method to utilize for review of cases involving the applicability of NEPA. It is submitted that an appropriate guideline is to be found in the recent case of *Environmental Law Fund* v. *Volpe*, 3 ERC 1941 (N.D. Cal. 3-22-72). In that case the court stated, as did the court below, that NEPA was

Congress' strongest statement of environmental policy and that the courts must be diligent in the enforcement of its provisions. The court noted, however, that the Council on Environmental Quality in its Guidelines for the implementation of NEPA had recognized the need to distinguish between new projects and projects already in progress as of January 1, 1970. These latter projects were to comply with the requirements of NEPA only to the "maximum extent practicable" rather than to the "fullest extent possible." The next task was to decide when the maximum extent practicable required application to the particular highway project. Clearly, said the court, if design approval had not been granted by January 1, 1970, it was still practicable to require compliance with NEPA as envisioned by PPM 20-8.[1] Even where design approval had been obtained prior to that date, however, compliance might still be practicable depending on the facts of the case. In such situations, the court recommended four factors to be considered:

(1) Community participation in the planning of the project.

(2) The state's consideration of environmental factors in its own planning.

(3) The likely harm to the environment if the project is constructed as planned.

(4) The cost of halting construction while the NEPA statement is prepared and filed.

Petitioner believes that in the balance of these factors the Court would reach a different conclusion than it did with regard to Arlington I-66 but, even if it did not, the adop-

[1] The court rendered no opinion as to projects approved between January 1, 1970 and February 1, 1971. See note 12.

tion of this test would provide State and federal officials with guidelines which could be applied to other ongoing projects instead of the visceral reaction effect of the "certainly outweigh" test. It is not important in terms of the facts of the instant case whether an environmental impact statement is required, in that one has already been prepared and circulated in its draft form; and, indeed, the final draft was near submission on the eve of the decision of the court below. Such a requirement is important of course with respect to providing a basis for a selection of future courses of action by governmental agencies with respect to highway projects.

Even more significant is the court's application of the "certainly outweigh" test to Section 128(a) of the Federal-Aid Highway Act of 1968 to require a relocation hearing on Arlington I-66. The fallacies of this argument are that, as pointed out *supra,* even the Council on Environmental Quality, which is charged with the implementation of NEPA, has not applied the "fullest extent possible" standard to ongoing projects, but has applied the "maximum extent practicable test."[2] Secondly, *neither* of those standards apply to the public hearing provisions of § 128(a) of the Federal-Aid Highway Act. By their terms, they apply only when a NEPA statement must be filed, *not* when amendments to an unrelated statute must be applicable to projects which had

[2] Section 11 of the CEQ Guidelines provides:

> *"Application of section 102(2)(C) procedure to existing projects and programs.* To the maximum extent practicable the section 102(2)(C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program." 36 Fed. Reg. 7724 (1971).

complied with the original requirements of that statute prior to the effective date of the amendment; yet, through some curious juxtaposition of NEPA and the Federal-Aid Highway Act of 1968, the court required a retroactive application of the provisions of the latter act on the basis of language found in the former.[3] In other words, the Court here decides not just whether NEPA should be applied retroactively but whether § 128(a), and all other new statutes or regulations for that matter, should be applied retroactively, and it uses the same "certainly outweigh" test, without any objective standards, resulting in the uncertainties hereinbefore mentioned. The court below further stated that there was no retroactive application of the statutes in question. It is respectfully submitted, however, that for the court on the one hand to require the petitioner to conduct another hearing when the previous hearing admittedly was lawful at the time it was held[4] and on the other hand to assert that it is simply applying NEPA to the facts as they exist today, is to engage in semantic sophistry. There can be no doubt that NEPA and § 128(a) are being retroactively applied.

Other courts have recently considered the question of the retroactivity of NEPA and reached a variety of results. The only recent decision by a circuit court is *Concerned Citizens*

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[3] It is interesting to note that no such theory was advanced by the plaintiffs or the amicus, either in the district court or the court of appeals. The plaintiffs' argument was briefed in laborious detail to the effect that a new location hearing was required due to shifts in population, job locations, traffic patterns and other demographic and social factors, such as to render the original location hearing "stale." This argument was, however, disposed of by the court in a footnote (n. 9, App. 25), and the relief sought was afforded by the court's own original theory.

[4] While the court found that there had not been compliance with the applicable statutes with respect to the Lee Highway portion of Arlington I-66, there was no such impediment with regard to the overall project; and yet, the court ordered that a new hearing be held to comply with the requirements of § 128(a) in its present form.

v. *Volpe,* 4 ERC 1042 (3rd Cir., April 28, 1972). In that case the plaintiffs sought to have a highway enjoined for failure to comply with NEPA and § 128(a) of the Federal-Aid Highway Act of 1968. Both location and design approval were given prior to the effective date of either of the acts. In refusing to retroactively apply these acts to an ongoing federal project, the court stated:

> "Plaintiffs next contend that the defendants failed to comply with the public hearing provisions of § 128(a) of Title 23, as construed by Policy & Procedure Memorandum (PPM) 20.8 issued by the Department of Transportation, 23 C.F.R., Part I, App. A (1972). These provisions were discussed at length in this court's opinion in Wildlife Preserves, Inc. v. Volpe, 443 F.2d 1273 [2 ERC 1094] (1971). And, as was there recognized, they do not apply retroactively to projects which received federal design approval prior to passage of either provision. Id. at 1274. The effective date of § 128(a) of the FAHA is August 23, 1968. Id. PPM 20.8 became effective on January 29, 1969. Pennsylvania Environ. Council, Inc. v. Bartlett, ... F.2d ..... [3 ERC 1421] (No. 19453, filed December 1, 1971). The district court found that final design approval occurred in this case no later than 1967. And the record clearly supports this finding. Therefore, we agree with the trial court's ultimate conclusion that § 128(a) of the FAHA and PPM 20.8 were not here applicable." 4 ERC 1044.

Thus, the standard for a determination of retroactive application of NEPA and the Federal-Aid Highway Act of 1968 in the Third Circuit is in direct conflict with that delineated in the instant case in the Fourth Circuit. A case illustrating the difference is *Conservation Society* v. *Volpe,* 4 ERC 1226 (D.C. Vt., June 2, 1972). In that case the court rejected the "broad view" (*ACT*) advocated by the

plaintiffs and the "narrow view" (*Concerned Citizens, supra*) offered by the defendants in favor of the guidelines as suggested by the *Environmental Law Fund* case, *supra.*

Another case in which a preference for the *Environmental Law Fund* approach was favored is *Ward* v. *Ackroyd,* 4 ERC 1209 (D.C. Md., June 8, 1972); however, the court was bound by the decision in the instant case. In adopting the "certainly outweigh" test the court observed:

> "While bound by the test, I respectfully must disagree with the test established by the Fourth Circuit in *Arlington Coalition* for determining when a project has reached the critical stage of completion beyond which the revisions to 23 U.S.C. § 128(a) do not apply. Without remanding the case for a factual determination, the Fourth Circuit panel in *Arlington Coalition* determined on unknown facts by unknown criteria that 'the cost of altering or abandoning the proposed location would not certainly outweigh whatever benefits might be derived therefrom,' Such a standard is vague, subjective and extremely difficult to apply unless it means that the costs of changing would never outweigh the benefits of changing. In this case, the problem of application of the standard has been alleviated somewhat because of the great factual similarity of the relevant circumstances here with those in *Arlington Coalition.* If anything, I-66 had progressed substantially further toward completion than has Segment 9 of I-70N. If, as the Fourth Circuit has held, NEPA requires application of revised § 128(a) to a project which has passed the point at which old § 128(a) used to apply but which has not yet reached the 'critical stage of completion,' this court believes that standards of the type set forth in *Environmental Law Fund* v. *Volpe,* 3 ERC 1941 (N.D. Cal., decided March 22, 1972) are more appropriate for that determination." 4 ERC 1224-1225, n. 71.

This represents an eloquent expression of the erroneous holding of the instant case.

Other cases which have considered the retroactivity of NEPA issue and which have adopted various standards are: *Keith* v. *Volpe* ..... ERC ..... (C.D. Cal., July 7, 1972) (the standards are essentially those of *ACT*, but there is more emphasis on design approval as a significant factor); *San Francisco Tomorrow* v. *Romney*, 4 ERC 1065 (N.D. Cal., April 25, 1972) (the court appears to base a decision as to the retroactivity of NEPA to an urban renewal project on whether there have been significant design changes subsequent to January 1, 1970, the effective date of NEPA); *Citizens to Preserve Overton Park* v. *Volpe*, 3 ERC 1510 (W.D. Tenn., January 5, 1972) (NEPA was held to be inapplicable because the approval of location occurred prior to the effective date of the act, notwithstanding that a 4(f) submission was required.) Thus, it is manifest that there is a need for this Court to provide a definitive standard in this very complex and controversial area of the law.

The reasons this particular holding is of great significance to the State are several. Firstly, as stated previously the precedential effect of this holding has momentous implications for other ongoing projects. Secondly, as to Arlington I-66, the requirements of compliance with NEPA and § 4(f) are not unduly burdensome as these statements have been prepared and submitted, while the requirement of a new public hearing not only creates additional delay and expense[5] but may place the State in difficulty under Virginia law which requires that property acquired for highway

[5] Present estimates are that a new hearing is at least a year away, and the cost of the study by independent consultants will be in the neighborhood of five to seven hundred thousand dollars. These costs are exclusive of the ultimate additional expenses due to inflation, both as to land values and construction costs.

construction must be resold to its original owner if not so used within 12 years. *Va. Code Ann.* § 33.1-90.[6] Thirdly, the requirement of a new public hearing raises the specter of further protracted litigation of a kind in which the State would be at a decided disadvantage, since if the current plan is not abandoned, opponents of the highway are certain to claim that objective consideration was not given to alternative routes due to the massive investment in the current location. Furthermore, the court's opinion is unclear whether a new *design* hearing must be held as well as a *location* hearing, and opponents of the highway are once again certain to assert that retroactive application of § 128(a) demands retroactive application of the two-hearing requirement of PPM 20-8 as well.

In order to justify a decision to order a new location hearing with attendant costs of seven to eight hundred thousand dollars exclusive of inflation costs, it would appear that at a minimum there should exist a reasonable possibility of substantial alteration in the project as presently planned as a result of such study and hearing. The court below justified its requirement for a new location hearing on the premise that I-66 might not now be needed in light of the proposed rapid rail service to the Rosslyn area, which service was not considered at the time of the 1958 hearing (App. 28). Several observations appear to be in order:

1. As the court noted, the rail service in part is scheduled to be located in the I-66 median. If such median is not available, rapid rail service may never be constructed.

2. The court assumes that rapid transit could alleviate the need for a highway. Yet, there is absolutely *no* evidence,

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[6] This section was amended effective July 1, 1972, to exempt from its operation highways delayed by litigation. Whether this amendment can lawfully relate to property already acquired, as in I-66, remains to be decided.

including the traffic studies offered as exhibits by the respondents to support this. In fact all of the affirmative evidence supports the need for a highway in addition to the rapid transit. It is not enough to say that rapid transit was not considered. There should also be some evidence to show rapid rail transit could replace the highway. There has been none and there can be none.

The respondents recognized this. It is for this reason that they used a "scatter gun" approach to arguing the need for a new location hearing. They apparently hoped that lack of quality as to their individual arguments with respect to changes in population, traffic patterns and job locations, as well as unforeseen rapid transit, could be overcome through the sheer quantity of those arguments. Yet, the court below seized upon one of these elements and elevated it to a level greatly disproportionate to its merit. In fact the plan of rapid transit is a concomitant, not an alternate, mode of transportation with respect to the traffic facilities here in question.

3. While it is true that rapid transit was not considered in 1959, at the time the location of I-66 was approved, as early as 1962, a consideration of such service had begun (Stip. (23)(d), App. 63). It cannot be doubted that there has been reevaluation over a period of ten years by the appropriate agencies of a need for I-66 in light of rapid transit. In fact there was no need for a new hearing with respect to rapid transit because no information was available to indicate that such service could meet the traffic needs of the area. As previously stated all of the evidence affirmatively showed that, indeed, the highway was needed, as well.

Assuming, therefore, that the highway is needed, it is almost inconceivable that there could be a substantial alteration of the present location. Apart from the economics in-

volved, environmental considerations alone would dictate that a virtually undeveloped corridor be utilized for highway purposes, rather than displacing hundreds of families and businesses elsewhere in the area.

While it is true that the "monitoring" of the traffic needs of the area is not the same as holding public hearings to solicit the opinions of affected persons, it is submitted that the existence of monitoring is an important fact in the determination whether there is a likelihood of change in present plans as a result of a new study. Given the absence of evidence to support the argument that either (1) the highway is not needed, or (2) that there is a preferable location, one can only conclude that the likelihood of a substantial change with respect to the present plans for the project even after the expenditure of seven to eight hundred thousand dollars for the study is extremely slight. It is submitted therefore that not only do the costs of abandonment of this project exceed the potential benefits; indeed, the costs of a restudy of the project do so.

In summary, it is submitted that Congress simply did *not* intend this type of protracted litigation over the minutiae of ongoing projects, and that Congress did *not* intend, in its understandable concern for future damage to the environment, to give disgruntled landowners ammunition to endlessly delay sorely needed projects which had complied with the laws and regulations as they existed at the time of their planning, and whose planners could not have been expected to foresee the continually expanding requirements imposed by judicial decisions under the National Environmetal Policy Act. This Court should not permit a "certainly outweigh" test to be used to further such delays. On the contrary, it should recognize the needs of *all* the citizens, including legimate environmentalists, and adopt a test for the application of these statutes that takes into consideration the complex

realities of life as well as the hypothetical theories of environmental crisis.

CONCLUSION

Petitioner submits that the decision below should be reviewed in that it adopts an unworkable standard with respect to the applicability to the federal highway program of the National Environmental Policy Act of 1969 and the Federal-Aid Highway Act of 1968, resulting in serious consequences to the nationwide program in general and to the Commonwealth of Virginia in particular. Such decision is also in conflict with those of many other jurisdictions, including the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Andrew P. Miller, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for the State Highway Commissioner of Virginia, hereby certify that on this the 7th day of August, 1972, three copies of the foregoing Petition For A Writ Of Certiorari were served upon counsel of record herein by depositing the same in the United States

Post Office, first class postage prepaid to Lawrence J. Latto, Esq., 734 15th Street, N.W., Washington, D. C. 20005, Robert S. Lynch, Esq., Department of Justice, Room 2344, Ninth and Pennsylvania Avenue, Washington, D. C. 20530, Charles McDonnell Radigan, Esq., 1415 N. Courthouse Road, Arlington, Virginia 22201, Arthur B. Vieregg, Jr., Esq., Post Office Box 547, Fairfax, Virginia 22030, James Tate, Esq., Assistant U.S. Attorney, Post Office Building, Alexandria, Virginia 22313 and Robert Funicello, Esq., 1346 Connecticut Avenue, N.W., Washington, D. C. 20036.

ANDREW P. MILLER
Attorney General

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[APPENDIX]

SUPREME COURT, U. S.
FILED
AUG 7 1972
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

No. 72-218

DOUGLAS B. FUGATE, COMMISSIONER, DEPARTMENT OF HIGHWAYS, COMMONWEALTH OF VIRGINIA,
Petitioner,

v.

ARLINGTON COALITION ON TRANSPORTATION, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ANDREW P. MILLER
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Supreme Court–State Library Building
Richmond, Virginia 23219

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APPENDIX A

Opinion of the United States Court of Appeals for the Fourth Circuit

Decided April 4, 1972

* * *

CRAVEN, Circuit Judge:

This is an ecology case. It is the declared public policy of the United States to protect and preserve the national environment "to the fullest extent possible." National Environmental Policy Act of 1969, 42 U.S.C.A. § 4332 (NEPA). The NEPA is a value judgment by the Congress that in order to "foster and promote the general welfare" each generation of Americans must, beginning now, act "as trustee of the environment for succeeding generations." 42 U.S.C.A. § 4331. We hold that even essential highway construction must yield to the congressionally structured priority.

Appellants are individuals who live in Arlington and own land in the path of the proposed highway, and associations whose objectives are the preservation of environmental and community values and the development of a sound transportation system in the Washington metropolitan area. Appellees are the Secretary of the United States Department of Transportation, the Commissioner of the Virginia Department of Highways, and their agents. Intervening appellees are the Arlington and Fairfax Counties Chambers of Commerce. Appellants filed suit in February 1971, seeking a declaration that in the planning of the segment of Interstate Route 66 (I-66) scheduled to run through Arlington County, Virginia, appellees violated certain federal statutes, and an injunction restraining appellees from proceeding with the planning and construction of this part of I-66. The district court refused relief and this appeal resulted.

On November 24, 1971, we granted appellants' request

for an injunction pending appeal. State appellee Fugate and his agents were enjoined "from condemning additional land for . . . Interstate-66 located in Arlington County, Virginia, and from requiring the appellants . . . to vacate their properties in the county." Federal appellee Volpe and his agents were enjoined "from approving, pursuant to 23 U.S.C. § 106(a), plans, surveys, specifications and estimates for . . . Interstate-66 located in Arlington County, Virginia."

We conclude that the federal statutes invoked by appellants are applicable to Arlington I-66 and must be complied with before further steps may be taken towards construction of this highway. Compliance means not only reconsideration of the proposed location of Arlington I-66 in the light of environmental, social, and economic policies set forth in the statutes; it means also suspension of work on Arlington I-66 pending this reconsideration. Further investment of resources by appellees in the proposed route would render alteration or abandonment of the proposed route increasingly costly and, therefore, increasingly unwise. If appellees were thus allowed to limit their options during their reconsideration of the location of Arlington I-66, reconsideration would be a hollow gesture. See *Calvert Cliffs' Coordinating Committee, Inc.* v. *Atomic Energy Commission,* 449 F.2d 1109, 1128 (D.C. Cir. 1971). We reverse the decision of the district court and remand this case for entry of an order enjoining further steps towards the construction and acquisition of right-of-way for Arlington I-66 pending reconsideration of the proposed location of this highway in accordance with the applicable statutes. Upon entry of such order, our injunction of November 24, 1971, will expire.

I. Factual Background

Interstate-66 is scheduled to extend from I-81, near Strasburg, Virginia, over 75 miles to the Potomac River in Arl-

ington County. The section in controversy begins at the Arlington County line, after the highway has passed through Fairfax County from the Washington Beltway, and ends at the Theodore Roosevelt Bridge. For the route of I-66 through Arlington, appellees intend to use 9.6 acres of Bon Air Park and about 5 acres of Spout Run Parkway. Bon Air Park is a tract of land acquired by Arlington County for park and highway purposes and presently used for a park. Spout Run Parkway is a park owned by the federal government and administered by the National Park Service. It is planned that I-66 will be connected in Spout Run Parkway to another proposed interstate highway, I-266, with a bridge to be constructed across the Potomac at a point called "Three Sisters." Whether and where I-266 and the Three Sisters Bridge should be built have been the subject of considerable public controversy and litigation. See *D.C. Federation of Civil Associations* v. *Volpe,* 434 F.2d 436 (D.C. Cir. 1970); *D.C. Federation of Civic Associations* v. *Volpe,* ..... F.2d ..... (D.C. Cir. 1971). If the proposed I-266 route to the Three Sisters Bridge is built, the 31.6 acres of Spout Run Parkway will be conveyed to the Virginia Department of Highways in exchange for funds to acquire the same number of acres along George Washington Parkway, and 13.97 acres of Spout Run Parkway will be used for I-266. After emerging from Spout Run Parkway, I-66 is scheduled to converge with Lee Highway for about one mile until it reaches the Potomac. Lee Highway, currently a three-to-four-lane road, will be separated at this point by the six lanes of I-66 into four eastbound lanes south of I-66 and four westbound lanes north of I-66, so that for about one mile there will be a fourteen-lane road.

Before a highway may be constructed with 90 percent federal funds as a part of the Federal Interstate System, the

procedure set out by the Federal-Aid Highway Act, 23 U.S.C.A. § 101 et seq., must be followed. First, a route must be selected by the highway department of a state and approved by the Secretary of Transportation. 23 U.S.C.A. § 103(d) (1) & (e). Next, the state highway department must submit to the Secretary for his approval a "program . . . of proposed projects" that the state wishes to construct with its portion of the funds appropriated for highway construction. 23 U.S.C.A. § 105(a). Then, the state highway department must submit to the Secretary for approval "such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require." 23 U.S.C.A. § 106(a). This is known as "P.S.&E. approval." As a prerequisite to P.S.&E. approval for each "project," the state highway department must certify to the Secretary that it has held public hearings on the location for each project and must submit a transcript of the hearings to the Secretary. 23 U.S.C.A. § 128. Following P.S.&E. approval, project agreements covering construction and maintenance are entered into between the Secretary and the state highway department. 23 U.S.C.A. § 110. Advertisements for bids may then be published and construction contracts awarded. Finally, the highway is constructed under the supervision of the state highway department. 23 U.S.C.A. §§ 112, 114.

The next step towards the construction of the Arlington County "project" of I-66 appears to be P.S.&E. approval. The public hearing relating to the location of this project was held in October 1958. In February 1959, the Virginia State Highway Commission chose the Fairfax-Bluemont Drive corridor as the location for Arlington I-66, and their recommendation was approved by the Federal Bureau of Public Roads in June 1959. This process was given extensive

newspaper coverage. The route selected has been shown in the Arlington County General Land Use Plan since 1961. Arlington County has relied upon the proposed route in its zoning, traffic, and utilities location planning, and numerous businesses have located near the proposed route. By January 11, 1965, acquisition of the right-of-way for the entire Arlington I-66 project had been approved, and by July 28, 1966, acquisition-of-right-of-way agreements between the state highway department and the Secretary had been entered into for the entire project. In the proposed corridor, 93.9 percent of all dwellings have been acquired; 98.5 percent of all businesses have been acquired; 75.6 percent of all families have been relocated; 84.6 percent of all businesses have been relocated; and 84.4 percent of all necessary right-of-way has been acquired. The cost of these acquisitions, for which the state has been reimbursed pursuant to the acquisition agreements, was $28,670,123.07. The estimated cost to complete the acquisition of right-of-way is $5,329,876.93. The Commonwealth of Virginia has expended $1,500,000 in preliminary engineering which will not be reimbursed by the federal government. In short, most planning and preliminary work has been done. Most of what remains to be done is actual construction, which has scarcely begun: a 0.298-mile approach to the Theodore Roosevelt Bridge, miscellaneous construction work on the bridge, and a 10-foot-by-10-foot box culvert under Lee Highway near Kirkwood Road. A series of on-site inspections of the Arlington I-66 route was conducted between 1961 and 1968 by state and federal officials. During these inspections, plans for the design of the highway were compared with actual conditions for the purpose of finalizing plans to be submitted to the Secretary for approval.

II. Jurisdiction and Laches

Before turning to appellants' claims, we dispose of two obstacles put in their path by appellees. First, Appellee Fugate, Commissioner of the Virginia Department of Highways, claims that he is not subject to federal jurisdiction. Because the challenged activities of his department—condemnation of right-of-way and eviction of the landowners—are authorized by state law and could be carried out independently of the Arlington I-66 project, he claims that no federal question exists with respect to these activities. 28 U.S.C.A. § 1331(a). We disagree, because these activities would not in fact be independent of this project. See *Named Individual Members of the San Antonio Conservation Society* v. *Texas Highway Department,* 446 F.2d 1013, 1028 (5th Cir. 1971); *Morningside-Lenox Park Association* v. *Volpe,* 334 F. Supp. 132, 146 (N.D. Ga. 1971). Appellee Fugate does not suggest that the Commonwealth of Virginia no longer seeks to build this highway with federal funds. If we were to find—as we do—that federal law requires that the proposed route for Arlington I-66 be reconsidered, acquisition by the state of right-of-way along the proposed route during the reconsideration would make proceeding with the proposed route increasingly easier and, therefore, a decision to alter or abandon the route increasingly undesirable. Thus the challenged activities of the state highway department would make a sham of the reconsideration required by federal law.[1] Action of a state highway department, challenged because furthering a project that under federal law allegedly must be reconsidered, is a matter in controversey arising under the laws of the United States. Fed-

[1] In *Ely* v. *Velde,* ..... F.2d ..... (4th Cir. 1971), the court declined to enjoin state officials from proceeding with a federally funded project covered by the NEPA. In that case, however, the problem of the effect of the state's action on federal law was not before the court.

eral jurisdiction over such state actions is essential to preserve federal question jurisdiction in the application of federal statutes. It is a form of pendant jurisdiction, but based upon necessity rather than convenience and limited to preventing emasculation of remedy clearly available against the federal respondents.

Secondly, appellees claim that appellants' suit should be barred by laches. Appellees as representatives of the general public and specific interest groups will be prejudiced by appellants' delay in bringing suit if the proposed route for Arlington I-66 is altered or abandoned. Most of the right-of-way for the proposed route has been acquired; Arlington County's planning with respect to zoning, traffic, and location of utilities has been based upon the route; and the location of numerous businesses has been chosen in reliance upon the route. Appellants could have brought suit earlier to minimize or avoid this harm; all of the relevant statutes were in effect by January 1, 1970, but appellants did not file suit until February 19, 1971. Nevertheless, we decline to invoke laches against appellants because of the public interest status accorded ecology preservation by the Congress.[2] We

[2] In *Lathan* v. *Volpe*, ... F.2d ..... (9th Cir. 1971), the court held that laches precluded a challenge to the validity of a hearing on the location of an interstate highway. The hearing in that case was challenged because it was allegedly procedurally defective. In our case appellants complain because *no* hearing was held on certain effects of the proposed route for Arlington I-66. See Part V. The public, we think has a greater interest in the outcome of the present suit. Furthermore, there is no indication in *Lathan* that the public's stake in the suit was considered at all. In *Triangle Improvement Council* v. *Ritchie*, 314 F. Supp. 20 (S.D.W.Va. 1969), *aff'd* 429 F.2d 423 (4th Cir. 1970) (per curiam decision), *cert. dismissed*, 402 U.S. 497 (1971), laches was held to bar a suit challenging the validity of a hearing on the location of a highway. The basis of the complaint is not stated in the opinion. The court believed that the complaint was without merit, however, and presumably concluded that the public interest would not be served by the suit. As discussed in Part V, we believe that the complaint in our case is valid.

believe that Arlington I-66 has not progressed to the point where the costs of altering or abandoning the proposed route would *certainly* outweigh the benefits that might accrue therefrom to the general public. In their reconsideration of the proposed route, the Secretary of Transportation and the Commissioner of the Virginia Department of Highways may decide, of course, that the costs do outweigh the benefits. If the opposite conclusion is a reasonable possibility, however, as it is here, the congressional declaration of policy in the relevant statutes of the importance of the benefits that might accrue demands that the merits of the question be considered by the appropriate agencies.

III. Section 102 of the National Environmental Policy Act of 1969

We hold that the federal appellees must file and consider an environmental impact statement in accordance with Section 102(C) of the National Enviromental Policy Act of 1969 (42 U.S.C. § 4332(C)) before taking further steps towards the construction of Arlington I-66. Section 102(C) reads as follows:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> > (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
> >
> > > (i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal Official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

It is undisputed that prior to the filing of this suit no Section 102(C) statement had been prepared for the project in question. It is also uncontested that this six-to-eight-lane highway is a "major Federal action significantly affecting the quality of the human environment." Appellees claim, however, that Section 102(C) is not applicable to Arlington I-66 because this project was in progress prior to January 1, 1970, the effective date of the Act. Arlington I-66, however, was and is a project ongoing *after* the effective date of the Act. We believe that applying Section 102 to Arlington I-66 would not violate the rule invoked in *Brooks* v. *Volpe*,

319 F. Supp. 90 (W.D. Wash. 1970), that a statute does not have retroactive effect absent a clear indication that Congress so intended. For reasons subsequently stated, we think applying Section 102(C) to this highway would simply not be a retroactive application of the Act. See *Named Individual Members of the San Antonio Conservation Society*, *supra* at 1025.

Doubtless Congress did not intend that all projects ongoing at the effective date of the Act be subject to the requirements of Section 102. At some stage of progress, the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be "possible" to change the project in accordance with Section 102. At some stage, federal action may be so "complete" that applying the Act could be considered a "retroactive" application not intended by the Congress. The congressional command that the Act be complied with "to the fullest extent possible" means, we believe, that an ongoing project was intended to be subject to Section 102 until it has reached that stage of completion, and that doubt about whether the critical stage has been reached must be resolved in favor of applicability.

> We must stress as forcefully as possible that this language does not provide an escape hatch for footdragging agencies; it does not make NEPA's procedural requirements somehow "discretionary." Congress did not intend the Act to be such a paper tiger. Indeed, the requirement of environmental consideration "to the fullest extent possible" sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts.

Calvert Cliffs' Coordinating Committee, *supra* at 1114. See also *Ely* v. *Velde*, ... F.2d ..... (4th Cir. 1971); *Morning-*

side-Lenox Park Association, supra; Environmental Defense Fund, Inc. v. *Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971). The cases refusing to apply Section 102(C) "retroactively" to projects ongoing at the effective date of the Act are not inconsistent with this principle because in those cases the factor determining the applicability of Section 102(C) appears to have been the stage of completion of the project. In *Investment Syndicates, Inc.* v. *Richmond*, 318 F. Supp. 1038, 1039 (D.Ore. 1970), the district court stated,

> I cannot believe that Congress intended that the NEPA apply to "major Federal actions" which had reached this stage of completion as of the date of enactment. It was not the intention of Congress to negate all of the work which had gone into this project, including design and planning costs, but to have it completed in an orderly manner.

In *Pennsylvania Environmental Council, Inc.* v. *Bartlett*, ___ F.2d ___ (3rd Cir. 1971),

> The Secretary's action approving Pennsylvania's application took place on November 20, 1969, and construction contracts were awarded on December 29, 1969. The only duty remaining on the Secretary after November 20, 1969 was to make a final inspection of the project after construction. 23 U.S.C. § 117(c). For all practical purposes, therefore, final federal action on the project took place prior to January 1, 1970, the effective date of NEPA. There is no evidence of a congressional intention that the act be applied retroactively to reopen decisions which had become final before that date. . . . This is not a case where discretionary federal administrative action takes place in stages, and some stages have taken place prior to January 1, 1970 while others remain.

In *Elliot* v. *Volpe*, 328 F. Supp. 831 (D. Mass. 1971), construction contracts had been awarded and actual construction had begun.

We cannot, of course, define for all cases the point of completion beyond which Section 102(C) is no longer applicable. We are certain, however, that Arlington I-66 has not yet reached that point: P.S.&E. approval has not been given, construction contracts have not been awarded, and actual construction on the highway itself has not begun.

Appellees claim that the district court correctly held that Section 102(C) is not applicable to Arlington I-66 because design approval for this project was obtained on January 21, 1971. Section 5 of the Federal Highway Administration Instructional Memorandum of November 30, 1970, states that an environmental study is not mandatory for projects obtaining design approval before February 1, 1971. We have held that Section 102(C) is applicable to a project until it has reached the state of completion where the costs of abandoning or altering the proposed route would clearly outweigh the benefits therefrom. In light of the "to the fullest extent possible" language, we have compared *all* of the steps already taken towards construction of Arlington I-66 with *all* of the steps yet to be taken and have concluded that this highway has not yet reached that stage of completion that cuts off application of Section 102(C). Manifestly the date of design approval alone does not accurately measure whether Arlington I-66 has reached the crucial stage, and determining the applicability of Section 102(C) by this standard alone would be arbitrary and capricious agency action and an abuse of administrative discretion. Administrative Procedure Act, 5 U.S.C.A. § 706(2(A).

The district court suggested and appellees assert that Section 102(C) is not applicable to highways. We disagree. In

the introduction to this section Congress demands that "public laws of the United States shall be interpreted and administered in accordance with the policies set forth" and that "all agencies of the Federal Government" shall comply with the requirements of the statute. Without a doubt the Department of Transportation was intended to be included within this sweeping language. See *Named Individual Members of the San Antonio Conservation Society, supra* at 1024. We read the cases relied upon by the district court and discussed above to mean that the refusals to apply the National Environmental Policy Act were occasioned not by a "highway" label but because construction had reached an advanced stage of completion. *Pennsylvania Environmental Council, Inc., supra; Elliot, supra; Brooks, supra.*

Finally, the district court held and appellees claim that the question whether Section 102(C) must be complied with is moot because the Secretary has agreed voluntarily to file an environmental impact statement. We disagree. Filing a report without suspension of work on Arlington I-66 until the report has been considered by the Secretary is not the sort of compliance that is likely to change the result. Section 102(C) contemplates not only that a report be compiled but also that the Secretary take into account the information contained therein in determining the final location and design of a highway.

> This statute does not limit the authority of any governmental agency in any permanent or conclusive manner. It does, however, contain a mandate that action can be taken only following complete awareness on the part of the actor of the environmental consequences of his action and following his having taken the steps required by the Act.

(10th Cir. 1971). We are led to this conclusion by language in Section 102(C)—*e.g.*, "proposed action," "should the proposal be implemented," "alternatives to the proposed action"—and the congressional intention to actually affect and preserve the environment, expressed in the declaration of policy in the Act (42 U.S.C.A. § 4331):

> (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.
>
> (b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—
>
> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

When the Secretary decides whether the proposed route for Arlington I-66 should be altered or abandoned because of information contained in the environmental report, he may, of course, take into account previous investment in the proposed route. *Morningside-Lenox Park Association, supra* at 145. Further investment of time, effort, or money in the proposed route would make alteration or abandonment of the route increasingly less wise and, therefore, increasingly unlikely. If investment in the proposed route were to continue prior to and during the Secretary's consideration of the environmental report, the options open to the Secretary

would diminish, and at some point his consideration would become a meaningless formality.

> Given the purpose of NEPA to insure that actions by federal agencies be taken with due consideration of environmental effects and with a minimum of such adverse effects, it is especially important with regard to federal-aid highway projects that the § 102(2)(C) statement be prepared early. If defendants' contention were accepted—that no environmental impact statement is required until the final approval state—then it could well be too late to adjust the formulated plans so as to minimize adverse environmental effects.
>
> Once the highway-planning process has reached these latter stages, flexibility in selecting alternative plans has to a large extent been lost. To paraphrase the District of Columbia Circuit, "In the language of NEPA, there is likely to be an 'irreversible and irretrievable commitment of resources,' which will inevitably restrict the [highway officials'] options. Either the [highway planners] will have to undergo a major expense in making alterations in a completed [plan] or the environmental harm will have to be tolerated. It is all too probable that the latter result would come to pass." [*Calvert Cliffs' Coordinating Committee, supra* at 1128.]

Lathan v. Volpe, ... F.2d ....., ... (9th Cir. 1971).

We hold that appellants are entitled to an injunction against any and all further work on Arlington I-66 pending preparation and consideration of the environmental report.

IV. Section 138 of the Federal-Aid Highway Act of 1968 and Section 4(f) of the Department of Transportation Act of 1966

We conclude that before further steps are taken towards the actual use of Spout Run Parkway and Bon Air Park for the route of Arlington I-66, federal appellees must ascertain

that there is "no feasible and prudent alternative" to the use of these parklands and that the project includes "all possible planning to minimize harm" to the parklands, in accordance with Section 138 of the Federal-Aid Highway Act of 1968 (23 U.S.C.A. § 138), and Section 4(f) of the Department of Transportation Act of 1966 (49 U.S.C.A. § 1653(f). The language of these sections is virtually identical and reads (49 U.S.C.A. § 1653(f)) as follows:

> (f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge or national, state, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

It is undisputed that Sections 138 and 4(f) have not been complied with. Appellees claim, however, that these sections are not applicable to the use of Bon Air and Spout Run parks because these parks are part of a project "approved"

before August 23, 1968, the effective date of the Acts.[3] Even if date of approval were the criterion for the applicability of these sections to projects ongoing at the effective date of the Acts, these sections would be applicable to Arlington I-66 because the Secretary's "approval" is necessary at several remaining stages of this project: the Secretary must "approve" the surveys, plans, specifications, and estimates for the project, 23 U.S.C.A. § 106; the Secretary must "approve" each construction contract awarded, 23 U.S.C.A. § 112(c) & (d); and construction will be "subject to the inspection and approval of the Secretary," 23 U.S.C.A. § 114. See *Named Individual Members of the San Antonio Conservation Society, supra* at 1025 n. 23, in which the court applied these sections to a highway which had been "approved" both before and after the effective date of the Acts. Date of approval, however, is not the criterion for applicability, because according to this criterion *every* project being built with federal funds would be subject to these sections since the Secretary's "approval" extends through construction. We agree with the district court that Congress did not intend that all projects ongoing at the effective date of the Acts be subject to these sections. At some stage short of completion the costs already incurred in a project could so outweigh the possible benefits of altering or abandoning the proposed route to avoid using parkland or to minimize harm from the use that because of the stage of progress alone "no feasible and prudent alternative to the use" would

[3] Bon Air Park is located in the I-66-1(43)73 project segment; authorization for the acquisition of this segment occurred on June 28, 1962, and the agreement for acquisition of this right-of-way was entered into on July 28, 1966. Spout Run Parkway is located in the I-66-1(35)75 project segment; acquisition authorization occurred on March 8, 1962, and the right-of-way acquisition agreement was entered into on January 28, 1963.

exist and "all possible planning to minimize harm" would have been done. We disagree with the district court, however, that because these sections are not applicable to some ongoing projects they are not applicable to all ongoing projects. Congress has declared through Sections 138 and 4(f) that conservation of parkland is of the utmost primary importance. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971). Congress has also directed in Section 102 of the National Environmental Policy Act (42 U.S.C.A. § 4332) that "to the fullest extent possible . . . public laws of the United States shall be interpreted and administered in accordance with the policies" set forth in the declaration of policy of the Act (42 U.S.C.A. § 4331), quoted above in Part III. We are compelled, therefore, to conclude that these sections are applicable to a project until it has reached that stage of progress where the costs of altering or abandoning the proposed route would *certainly* outweigh whatever benefits might accrue therefrom, and that doubts about whether this stage has been reached must be resolved in favor of applicability. Arlington I-66 has not yet reached that stage of completion. The parklands have not been acquired, P.S.&E. approval has not been given, construction contracts have not been awarded, and construction on the highway itself has not begun. The court in the *San Antonio* case emphasized the date of approval as the factor determining applicability of these sections. The holding in that case is not inconsistent with ours, however, because these sections, we think, would have been applied to the highway in that case under our standard: P.S.&E. approval had not been given for the use of the park in question, construction contracts for the portion of the highway to run through the park had not been awarded, and construction of the portion to run through the park had not begun. In *Wildlife Pre-*

serves, Inc. v. *Volpe,* 443 F.2d 1273 (3rd Cir. 1971), the court declined to apply Sections 138 and 4(f) retroactively to a highway ongoing at the effective date of the Acts. The factor determining applicability in that case, we believe, was the stage of completion of the highway; construction contracts had been awarded and construction had begun. As suggested above in Part III, a project might be so nearly complete that applying these sections to it could be termed "retroactive" application.

The district court adopted appellees' contention that Sections 138 and 4(f) are not applicable to the use of Bon Air Park and Spout Run Parkway because these parks have not been determined "significant" by the federal or local officials having jurisdiction thereof. Furthermore, the court viewed the willingness of both local and federal officials to use these parks for highway right-of-way as a determination that these parks are insignificant. Because "the very existence of [these sections] indicates that protection of parkland was to be given paramount importance," *Citizens to Preserve Overton Park, supra* at 412-13, we must interpret these sections to mean that land used as a public park is presumed "significant" unless explicitly determined otherwise, in a manner envisioned by these sections, by the appropriate federal or local officials. There is no such determination before us with respect to Bon Air and Spout Run parks.[4] We conclude, therefore, that these parks are "significant" and protected by Sections 138 and 4(f). In the "significance" determination envisioned by Sections 138 and 4(f), the desirability of using the particular parkland in question as a highway must be ignored and only the value of the park

[4] Additionally, the plan to replace Spout Run Parkway with other parkland in the same vicinity indicates to us that Spout Run is significant as a park.

as a park can be considered. See *Named Individual Members of the San Antonio Conservation Society, supra* at 1026. Were this not so, land valuable to the community as a park could be used for a highway even though "feasible and prudent alternatives" existed because federal or state officials had decided that using the park for highway purposes was desirable according to criteria other than whether such alternatives existed, the *only* criterion allowed by the Acts. For this reason, the choice by federal and local officials to use Bon Air and Spout Run parks for Arlington I-66 standing alone is not a determination that these parks are not "significant" as parks.[5]

Finally appellees claim that the question whether they must comply with Sections 138 and 4(f) is moot because they have agreed to comply voluntarily. We disagree because voluntary compliance alone does not give appellants full relief. In the first place, as discussed above in Part III, suspension of work on Arlington I-66 is necessary if the Secretary's determination under Sections 138 and 4(f) is to be meaningful; continuing investment in the project at its present state of development would render alternatives to use of the parks less feasible and prudent. In the second place, the Secretary's determination with respect to Spout Run Parkway will be meaningful only if made after it is known with reasonable assurance whether the proposed I-266 and Three Sisters Bridge project will be built and, if so, where the bridge will be located. Pursuant to an order of the Circuit

[5] We have been advised by counsel that subsequent to the district court's opinion, on January 8, 1972, the Arlington County Board adopted the following statement: "The Arlington County Board declares specifically that Bon Air and Spout Run parklands are of greater significance to Arlington and are more highly valued as parkland than as road right of way." Our decision with respect to the significance of these parklands does not depend upon this finding.

Court of the District of Columbia, the Secretary is now in the process of reexamining the proposed location for the I-266 project. *D.C. Federation of Civic Associations* v. *Volpe*, ... F.2d ..... (1971). Although the district court's finding that "(t)he Three Sisters Bridge is not a part of I-66—neither is the proposed connecting road, I-266" is not clearly erroneous, it failed to consider the relationship between the projects. If the I-266 project is not built at all or if the location of the bridge is changed, it is apparent that avoiding Spout Run Parkway for the use of I-66 will be more feasible and prudent because present plans call for I-266 to connect with I-66 in this park.[6] In order to specify the appropriate time for the reconsideration of the proposed use of Spout Run Parkway, we must first decide the threshold question of whether reconsideration is required at all.

V. Section 128(a) of the Federal-Aid Highway Act of 1968

We conclude that before further steps may be taken towards the construction of Arlington I-66, the state appellees must hold a public location hearing in accordance with Section 128(a) of the Federal-Aid Highway Act of 1968 (23 U.S.C.A. § 128(a)).[7] When the 1958 public hearing on

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[6] Appellants claim that continuing with the I-66 project in the face of the uncertain status of the Three Sisters Bridge is in itself arbitrary and capricious action on the part of the Secretary. Consideration of this claim is unnecessary because our order that the Sections 138 and 4(f) determination must be made after the Three Sisters Bridge dispute has been resolved, coupled with our injunction of further work on I-66 until the determination is made, gives appellants the same relief—injunction until the dispute is settled—that they request under this claim.

[7] We agree with the district court that Arlington I-66 is excluded from the hearing requirements of the Federal Highway Administration's Policy and Procedure Memorandum 20-8, 23 C.F.R. Part 1, Appendix A. Section 6(d), which contains the guidelines for projects on which a hearing has been held before January 14, 1969, applies only to projects which have not received location approval.

the location of Arlington I-66 was held, Section 128(a) required only that the hearing seek information to aid in the consideration of the *economic* effects of that location. In 1968 this section was amended and additional information must now be sought:

> (a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. . . .

We think that the requirements added to Section 128(a) apply to a highway ongoing at the effective date of the amendment if the costs of altering or abandoning the proposed location would not certainly outweigh whatever benefits might be derived therefrom. Our conclusion is compelled by the congressional directive in Section 102 of the National Environmental Act (42 U.S.C.A. § 4332) that "to the fullest extent possible . . . public laws of the United States shall be interpreted and administered in accordance with the policies" set forth in the declaration of policy of the Act (42 U.S.C.A. § 4331), quoted in Part III above. As we have concluded in Parts III and IV above, Arlington I-66 has not yet reached the critical stage of completion. It is distinguishable, therefore, from those highways actually under construction to which Section 128(a) as amended was held inapplicable. *Wildlife Preserves, Inc., supra; Elliot, supra.* Our case is distinguishable also from *Triangle Improvement*

Council v. *Ritchie,* 314 F. Supp. 20 (S.D.W.Va. 1969), *aff'd* 429 F.2d 423 (4th Cir. 1970) (per curiam decision), *cert. dismissed,* 402 U.S. 497 (1971), in which the effect of the National Environmental Policy Act upon the hearing requirement of Section 128(a) was not considered.

Furthermore, we think that the new hearing on the location of Arlington I-66 must not only seek information about the social effects of the proposed location, its impact on the environment, and its consistency with the community's urban planning goals, but also must seek information about the economic effects of the location in light of the proposed rapid rail service to the Rosslyn area. One line of the proposed Washington Metro will run along the same route as Arlington I-66 to Rosslyn. At the time of the 1958 hearing, this development was not anticipated.[8] From today's vantage point, the economic effects of Arlington I-66 might be significantly different than projected in 1958—rapid rail service might better satisfy the needs of this area than would I-66. Moreover, Arlington I-66 has not yet reached the stage of completion where alternation or abandonment of the proposed route is impossible. We are certain that Congress intended that if there is a reasonable possibility that a mistake has been made in the planning of a project as expensive, disruptive, and permanent as a highway, and if that project can still be altered or abandoned, the project must be held in abeyance pending determination of whether a mistake has in fact been made. We cannot accept the district court's decision that a new hearing on the economic effects of Arlington I-66 is unnecessary because "the transportation needs

[8] Although rapid rail service in the Washington metropolitan area was being planned in 1958, a line in the general area of Arlington I-66 was not planned. *See* National Capital Planning Commission, *Transportation Plan for the National Capital Region* (1959).

of the area have been monitored over the years by the many agencies responsible therefor—and the officials charged by law for selecting the location for I-66 have reaffirmed their choice on numerous occasions up to the present time." Section 128(a) requires that included in the information considered in evaluating the economic effects of a highway must be information obtained at a public hearing. Study by experts is not the equivalent of a public hearing, and continuing evaluation of the economic effects of Arlington I-66 based only on such study is, therefore, not consideration within the meaning of the statute.[9]

Appellants claim also that a new public hearing must be held on the economic effects of the juncture of Arlington I-66 with Lee Highway. At the time of the 1958 hearing, the plan to divide and expand Lee Highway apparently had not been formulated and, therefore, was not considered. We agree with appellants that because a fourteen-lane highway might have significantly different economic effects than a six-to-eight-lane highway in the same location, the 1958 hearing cannot be considered to have taken into account the economic effects of the highway as planned. As discussed above, since the proposed route can still be altered or aban-

[9] Appellants cite also the facts that the number of jobs available in the Virginia suburbs has increased more rapidly than the number available in the District, that businesses have located in substantial numbers in Arlington County, and that several post-1958 changes have occurred in the Washington highway system, as evidence that the economic effects of Arlington I-66 would be different than expected in 1958. We disagree. The change in job distribution was projected in 1958; it has merely occurred more quickly than expected. If anything, the accelerated rate supports keeping I-66 in its present location. The location of businesses along the proposed route is such a natural direct result of constructing a highway that we think it can be said that it was anticipated and, therefore, considered in 1958. Finally, we think that changes in the highway system within the city of Washington were not so unforeseeable as to require a new hearing.

doned in response to information obtained from a hearing, we think that a hearing in addition to the 1958 hearing must be held on this portion of the highway. We believe, however, that the hearing held to consider the design of the portion of I-66 including Lee Highway on September 29, 1970, and continued on December 7, 8, and 9, 1970, satisfies the requirements of Section 128(a). Although Section 128(a) requires a hearing only on the "location" of a proposed highway, the regulations of the Department of Transportation require a hearing on the "design" of a highway as well. Federal Highway Administration, Policy and Procedure Memorandum 20-8, § 6, 23 C.F.R., Part 1, Appendix A. This, we think, is recognition by the Secretary that the effects of a highway's location depend not only on the corridor of a highway but also on what type of highway will occupy the corridor. Since the economic effects of the Lee Highway section of Arlington I-66 might be substantially different than expected in 1958 because of the design of this portion, a hearing on the design alone of this portion is sufficient.[10]

Section 128(a) contemplates that information gathered from a public hearing be "considered" by the state highway department in fixing the location of a highway. As discussed above, reconsideration of the location of Arlington I-66 will be meaningful only if further expenditure of time and effort in the present route is suspended. Therefore, the progress of

[10] Appellants also claimed below that the 1958 proceedings violated Section 128(b) of the Act because a tape recording of the 1958 hearing rather than a written record was submitted to the Secretary. Subsequent to the 1958 hearing, the Department adopted regulations permitting only written records of the Section 128(a) hearing. Federal Highway Administration, Policy and Procedure Memorandum 20-8, § 8(c) (1), 23 C. F. R., Part 1, Appendix A. We agree with the district court that a tape recording is the functional equivalent of a written transcript and that even were it not, the Secretary's regulations should not be given retroactive effect.

the present route must be enjoined pending certification by the state highway department to the Secretary that a new public hearing has been held (or that the opportunity for such a hearing has been afforded) to obtain the information required by the 1968 amendments and that the reconsideration of this information and the information obtained at the design hearing on the Lee Highway portion of Arlington I-66 has been accomplished.

VI. Relief

In summary, we hold that further acquisition of right-of-way and construction of Arlington I-66 must be enjoined until federal appellees have

> (1) filed and considered an environmental impact statement, in accordance with Section 102(C) of the National Environmental Policy Act, and,
>
> (2) ascertained that there is "no feasible and prudent alternative" to the use of Bon Air Park and Spout Run Parkway (the determination with respect to Spout Run Parkway to be made after the resolution of the Three Sisters Bridge controversy) and that the project includes "all possible planning to minimize harm" to these parklands, in accordance with Section 138 of the Federal-Aid Highway Act and Section 4(f) of the Department of Transportation Act,

and until state appellees have certified to the Secretary that a new public hearing has been held (or that opportunity for such hearing has been afforded)

> (1) to obtain information about the social effects of the proposed location, its impact on the environment, and its consistency with the community's urban planning goals, and

(2) to obtain information about the economic effects of the proposed location in light of the planned rapid transit service to Rosslyn,

and that the information obtained from this hearing and the hearing upon the design of the Lee Highway portion of Arlington I-66 have been considered, in accordance with Section 128(a) as amended of the Federal-Aid Highway Act.

On remand the district court will enter an appropriate judgment granting injunctive and such other relief as may be necessary.

Reversed and Remanded.

* * *

ORDER

Entered May 9, 1972

On petition to rehear we modify our prior opinion to delete (page 40, slip opinion) the requirement that federal appellees shall not proceed until after Three Sisters Bridge is finally located or finally abandoned.

Whether Three Sisters Bridge will be built and where it will be located are factors that cannot be ignored in deciding what to do about I-66 and I-266. But our judgment shall not be construed to prevent simultaneous consideration of all three inter-related propects and their probable impact on each other.

s/ J. Braxton Craven, Jr.
United States Circuit Judge

* * *

APPENDIX B

ORDER

Entered November 24, 1971

The appellants, plaintiffs below, seek an injunction pending their appeal from an order of the district court denying their prayer for an injunction against construction of that portion of the federal interstate highway designated as Interstate-66 located in Arlington County, Virginia.

Without considering all of the issues pressed by the appellants, it is sufficient to say that the record raises substantial question about the legality of constructing a section of the highway through a national park and the legality of proceeding without the environmental impact statement required by law.

Therefore, with the concurrence of Judge Craven and Judge Russell, it is ADJUDGED AND ORDERED that Douglas B. Fugate, Commissioner, Virginia Department of Highways, and his officers, agents, employees, and attorneys, and those persons in active concert or participation with them who receive notice of this order are enjoined and restrained from condemning additional land for that portion of the federal interstate highway designated as Interstate-66 located in Arlington County, Virginia, and from requiring the appellants, Vera Koehler, Harold D. McCoy and Elizabeth Snedden to vacate their properties in the county.

It is further ADJUDGED AND ORDERED that John A. Volpe, Secretary of Transportation, his officers, agents, employees, and attorneys, and those persons in active concert or participation with them who receive notice of this order are enjoined and restrained from approving, pursuant to 23 U.S.C. § 106(a), plans, surveys, specifications and estimates for that portion of the federal interstate highway

designated as Interstate-66 located in Arlington County, Virginia.

This injunction shall remain in full force and effect pending the appeal of this case, or until further order of the court; provided that the appellants, or someone in their behalf, shall post bond in the penalty of $100.00, conditioned as the law directs.

John D. Butzner, Jr.
United States Circuit Judge

* * *

APPENDIX C

MEMORANDUM OPINION

Entered October 8, 1971

The plaintiffs want this Court to stop further construction of I-66 through Arlington County. The defendants and intervenors insist that this interstate highway be completed without further delay.

The plaintiffs are four residents of Arlington owning land in the corridor selected for the highway and two unincorporated associations interested in the preservation of environmental and community values, including sound transportation planning in Arlington County.

They contend that a new location or corridor public hearing must be held before further action can be taken in re the planning and construction of the highway—first, because state authorities failed to submit a transcript of the 1958 public hearing to the Secretary of Transportation prior to federal approval as required by 23 U.S.C. § 128—second, because the 1958 hearing in any event was outdated due to the passage of time—and third, because the 1968 amendment of § 128 requires consideration of the economic and

social effect of the highway's location and its impact on the environment.

The plaintiffs also contend that the 1958 hearing is insufficient to permit the use of I-66 funds for the planning, relocation and construction of a portion of Lee Highway (US 29-211) in that this item was then neither mentioned or discussed—and that the Secretary of Transportation is in clear violation of § 138 of the Federal Highway Act, 23 U.S.C. § 138, and 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f), both of which provide that the Secretary shall not approve any program or project that contemplates the use of any public park unless he has determined that (1) there is no feasible and prudent alternative for the use of such land, and (2) such program includes all possible planning to minimize harm to the park.

Lastly, the plaintiffs say the Secretary of Transportation has violated § 102 of the National Environmental Policy Act, 42 U.S.C. § 4332(c), by failing to require the filing of an environmental impact statement before permitting further completion of I-66 after the effective date of the Act.

The defendants are the Secretary of Transportation and the Division Engineer of the Federal Highway Administration, and the Commissioner of the Virginia Department of Highways and the Recorder of Deeds of Arlington County, Virginia. (The latter has been dismissed as a party defendant.) The intervenors are the Arlington County Chamber of Commerce and the Fairfax County Chamber of Commerce.

The defendants insist that the Congress of the United States has entrusted to their discretion the desirability and necessity for the construction of I-66 and that their exercise

of this discretion is not subject to review, absent arbitrary and capricious action. They do not question judicial review of their administrative actions subject to the provisions of the Administrative Procedure Act, 5 U.S.C. § 701, et seq. —They further say they have fully complied with all federal and state statutes requisite to the location and construction of I-66.

The Commissioner of the Virginia Department of Highways asserts the additional defense of sovereign immunity under the Eleventh Amendment of the Constitution of the United States.

The intervenors say their respective counties have realigned their highway systems and have predicated much of their business and industrial zoning in reliance upon the building of I-66. Further, that millions of dollars of public and private money has been spent on both private and public developments, much of which will be seriously impaired or lost if the completion of the highway is either unduly delayed or abandoned.

Both claim laches on the part of the plaintiffs in not timely filing this suit.

This case was heard and decided upon the well prepared stipulation of facts and exhibits and agreed issues of law, all of which have been filed herein and made a part hereof—and upon the briefs and argument of counsel.

A brief summary of the stipulated facts and history of the development of I-66 discloses that it is a part of the forty-one thousand mile system of highways authorized by Congress in 1956, 23 U.S.C. § 103(e). The highways are built through Federal-State cooperation—the Federal government, ninety per cent of the cost; the State, ten per cent—Actual construction is undertaken by the State with prior Federal approval of the successive steps required to complete the project.

I-66 connects Washington, D. C., with I-81, a major inland north-south route running through the Shenandoah Valley—and provides major arterial service along the corridor through northern Fairfax and Arlington Counties and to the center of the District of Columbia.

The building of an interstate highway begins with the inclusion of the route on the interstate system, which places a route on a map connecting points without specification of the place on the ground where the road will be built.

Next, the corridor for the highway is chosen by the State. There is are no established limits to the width of the corridor—anything from five hundred yards to a half mile—Corridor approval by the Federal highway officials is preceded by a public hearing at which alternate corridors are presented for public comment, at which interested citizens are given an opportunity to record their views as to the effect of the proposed highway on the community.

After the corridor has been approved the engineers and survey crews further narrow the location of the roadway as the design is developed—Eventually a detailed location is made and approved. Thereafter acquisition of the necessary right-of-way is authorized—Federal funds are then committed to the extent necessary to acquire the right-of-way.

The total mileage of I-66 is 75.4 miles, 25 miles of which have been completed.

The Virginia Department of Highways began preliminary studies for the location of I-66 through Fairfax and Arlington Counties prior to 1958 and completed three of the studies regarding the location of the highway in April and October 1958.

A public hearing was held in Arlington on October 29, 1958 to consider a corridor for I-66 through Arlington. Four

alternate routes were then considered and discussed. The Federal and State engineers and some of the plaintiffs were present at this hearing. This hearing followed a similar hearing held before the Arlington County Board on September 27, 1958, at which time citizens and civic associations presented their views.

The Arlington County Board recommended that Corridor No. 2 (Fairfax Drive-Bluemont Drive) be approved. The Virginia State Highway Commission adopted this recommendation on February 25, 1959 and submitted the same to the Federal Bureau of Public Roads on March 10, 1959. Additional information was submitted by the Division of Regional Engineers, and the Fairfax Drive-Bluemont Drive corridor was formally adopted on June 4, 1959.

On February 26, 1960 Federal officials informed the Virginia Department of Highways that the public hearing held on October 29, 1958 fulfilled the requirements of 23 U.S.C. § 128 and that no additional hearing was required.

In 1961 and 1962 right-of-way acquisition was authorized for the total length of I-66 from the Beltway to Rosslyn. The initial acquisition was for six lanes. In 1965 the project was expanded to eight lanes. The necessary additional authorizations were had on various dates between June of 1965 and July 1966.

Utility relocation projects were approved in 1966, 1967, 1968, 1969 and 1970.

Public hearings to consider the proposed design of I-66 between Washington Boulevard and Lynn Street were held on December 7, 8 and 9, 1970.

From the date of the location approval, some 9124 parcels of land had been acquired in Arlington and Fairfax Counties, including 580 dwellings and 68 businesses, at a cost of $28,670,123.07. Three-eighs dwellings and one business

properties are yet to be acquired at an estimated cost of some $5,000,000,000. Four hundred seventy-five families and 61 businesses have been relocated.

The Virginia State Highway Department has spent over a million and a half dollars for necessary preliminaries and surveying. Point field inspections with plans in hand have been made, beginning in 1961 to date. These field inspections have all been documented by letters indicating that a satisfactory agreement had been reached in the field on all points.

The present proposed location of I-66 has been routed on the Arlington County General Land Use Plan since 1961 and the general corridor for I-66 has been established in local newspapers on many occasions since that time.

Some 45.6 acres of Bon Air Park are to be taken for use in connection with I-66. The land to be used for this purpose is designated on the Arlington County General Land Use Plan dated August of 1961 with amendments through January of 1965. This tract of land was acquired by Arlington County for park and recreation purposes.

Approximately five acres of Upton Hill Regional will be taken for I-66 use.

If the proposed I-66 route to the Outer Beltway is built, some 11.6 acres of Upton Hill Regional will be conveyed to the Virginia Department of Highways, 10.1 acres of which will be utilized for I-66. This land is to be replaced by acquisition of other acreage in the County Washington Blvd. area.

If the Beltway and I-66 are not built, neither of which is a part of the I-66 project, some changes in the design of I-66 will be necessary. These were considered and approved August 1965.

Portions of I-66 have been constructed in Arlington County [illegible] from Lynn Street to the west and from

Theodore Roosevelt Bridge, 1962—construction on the bridge over Little River, 1963—median barrier and guard rail on the bridge, 1963—box culvert under Lee Highway near Kirkwood Road, 1968.

The Old Dominion right-of-way was acquired in 1965—The Metro took an option in 1967 to use the median of the right-of-way for rapid transit—The option was exercised April 24, 1970—Major design features for I-66 was of Glebe Road for joint use with Metro have been completed.

Right-of-way acquisition approval for division and expansion of Lee Highway (29-211) between Kirkwood Road and Lynn Street was given in January of 1961 and April of 1962.

The State defendants' claim of sovereign immunity under the Eleventh Amendment of the United States Constitution is without merit—This is not a suit brought against the State of Virginia—It is a suit brought against its Commissioner of the Department of Highways to compel him and others to comply with the requisite Federal laws in the building of I-66 through northern Virginia. Suits involving various aspects of interstate highway projects have been filed in the Federal courts—None have found jurisdiction over State officials lacking. See Citizens Committee for Hudson Valley v. Volpe, 302 F.Supp. 1083 (SDNY 1969), affirmed 425 F.2d 97 (2nd Cir. 1970); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Ely v. Velde, 321 F.Supp. 1088 (EDVa. 1971).

Although this suit could and probably should have been brought sooner, the delay—standing alone—is hardly sufficient to justify dismissal—It has been considered, however, in determining whether the errors complained of were prejudicial to the plaintiffs.

The plaintiffs have failed to sustain their claim—that a new location or corridor hearing must be held before further work can proceed—by law or fact.

The transcript requirement of 23 U.S.C. § 128(b) was satisfied by the submission of a complete tape recording of the October 29th public hearing—It was reviewed extensively by the Federal officials and was only a part of the evidence that was considered in deciding upon the present route.

PPM 20-8, in effect at the time of the 1958 hearing, provided that "a public hearing shall be held and a transcript made thereof"—Nothing then was said about a written transcript. Tape recordings were then and now used in certain phases of federal court proceedings—and often heard by Circuit and District Court judges—in lieu of written transcripts.

The fact that PPM 20-8 was amended June 16, 1959—some seven months after the date of the public hearing and twelve days after date of approval—stating that tape recordings will not be accepted as a transcript does not vitiate the October 29th hearing: first, because the amendment is not retroactive; and secondly, because the question was specifically raised by the Virginia Location and Design Engineer in his letter of November 18, 1959—and the Federal officials, after reviewing the matter, advised the Virginia Department of Highways on February 25, 1960 that no additional hearing was required.

Submitting a tape recording instead of a written transcript at best constitutes harmless error.

Neither is a new location hearing required because of the alleged changes in the transportation situation during the past thirteen years or because of the 1968 amendments of § 128.

Time alone is not enough, especially when the record discloses that design planning and actual construction have

continued uninterrupted from the date of the corridor approval to the date of the filing of this suit.

The transportation needs of the area have been monitored over the years by the many agencies responsible therefor—and the officials charged by law for selecting the location for I-66 have reaffirmed their choice on numerous occasions up to the present time.

The evidence in this record supports their decision to continue the originally approved location of I-66 without a new location hearing—and it will not be disturbed.

PPM 20-8 as amended January 14, 1969 is not applicable because 6(d) of that PPM exempts projects which received location approval prior to January 14, 1969—The corridor for I-66 was approved June 4, 1959—The plaintiffs' reliance on D.C. Federation of Civic Associations v. Volpe, 316 F.Supp. 754 (DCDC 1970) is misplaced. See Elliot v. Volpe, 328 F.Supp. 831 (DC Mass. 1971), and Wildlife Preserves v. Volpe, ___ F.2d ___ (3rd Cir. 1971).

Although the plaintiffs now tacitly concede that a new corridor hearing would not change the location of I-66, they insist that the 1959 corridor approval did not include the division and relocation of Lee Highway between Kirkwood Road and Lynn Street.

The Congressional declaration of policy for the construction of the interstate system, as set forth in 23 U.S.C. § 101, states "existing highways located on an interstate route should be used to the extent that such use is practicable, suitable and feasible. . . ."

The Federal Highway Administrator has always construed this policy to mean that it should and may include the cost of improvement of local roads when necessary or convenient to accommodate the traffic related to the interstate roads being built.

The grade separation structure and interchange at Lee Highway near Kirkwood Road, including the ramps and roadway coming off the ramps, and the separation structure from Veitch Street to North Lynn, were both approved to provide local access and to replace disrupted service—The transcript of the 1958 hearing and the subsequent design and road location approvals clearly establish that that portion of Lee Highway here questioned was within the corridor as approved in June of 1959.

The Federal officials have concluded that the 1958 public hearing adequately considered the essential features of these plans. They have also approved the costs of these local improvements as a part of the cost of I-66. These determinations are controlling unless plainly inconsistent with the relevant statutes. See Udall v. Tallman, 380 U.S. 1 (1965).

Further public hearing on this phase of the building of I-66 is not required.

Next, the plaintiffs seek to stop further construction of I-66 by invoking the provisions of § 138 of the Federal-Aid Highway Act, 23 U.S.C. § 138, and 4(f) of the Department of Transportation Act, 49 U.S.C. § 1653(f), both of which provide that the Secretary of Transportation shall not approve any program or project that contemplates the use of any public park until he has made certain determinations.

They claim the Secretary of Transportation approved construction of the culvert for Spout Run Creek—the design for the whole segment, including five acres of Spout Run Parkway and the 1968, 1969 and 1970 utility relocations—without complying with the statutory directive.

Although they do not contend these statutes are retroactive, they say they should be construed to cover all work begun after their effective dates—August 23, 1968 for § 138 and April 1, 1967 for § 1653 (f)—since the purpose of the

statutes is to bar the use of park land for highway purposes except under certain conditions.

To do so would require the abrupt halt of all work then being performed on all interstate highways that traversed any park land regardless of the percentage of completion or costs incurred—Clearly that was not the intent of Congress. These statutes are not applicable to interstate highways approved prior to their effective dates—I-66 was approved June 4, 1959.

The Court of Appeals for the Third Circuit expressly held in Wildlife Preserves v. Volpe, supra, that these statutes were not to be given retroactive effect. See also Triangle Improvement Council v. Ritchie, 314 F.Supp. 20 (SDWVa.), affirmed 429 F.2d 423 (4th Cir. 1970).

The box culvert under Lee Highway and the utility relocations complained of do not directly involve any of the so-called park land—The box culvert is some 950 feet from the nearest publicly owned land, the construction of which was authorized more than a month prior to the effective date of 23 U.S.C. § 138. Although the utility relocations took place after the effective date of § 1653(f), they were but a part of the right-of-way approvals given in 1962—Site preparation, including utility relocations, is authorized by the right-of-way approval.

Further, these statutes are inapplicable to I-66 because Arlington County and the National Park Service have not found that the areas under their respective jurisdictions are of local or national significance for park purposes, as required by these statutes.

Bon Air Park was acquired by Arlington County in 1950 for the specific purpose of highway use—The portion to be utilized for I-66 has been designated on the County's General Land Use Plan since 1961.

Spout Run Parkway is now being used for park purposes and has been since prior to I-66 approval in 1959. The National Park Service has agreed to the use of five acres of this area for I-66 and 13.97 acres for I-266 (the proposed connection with the proposed Three Sisters Bridge) on condition that the land be replaced with other similar land. Although there has been no specific finding by the appropriate Arlington County and National Park Service officials that these lands are of local or national significance for park purposes, the only inferences that can be drawn from the facts clearly indicate that these officials view these areas more important for highway than for park purposes.

Finally, the plaintiffs invoke the provision of the National Environmental Policy Act of 1969. This Act became effective on January 1, 1970. Section 102(2)(c) requires that major federal action be accompanied by the filing of a statement of environmental impact of this action with the Council on Environmental Quality.

A number of courts have held that this Act is not applicable particularly to cases involving interstate highways. See Pennsylvania Environmental Council v. Bartlett, 315 F.Supp. 228 (MDPa. 1970); Brooks v. Volpe, 319 F.Supp. 90 (WDWash. 1970); and Elliot v. Volpe, supra.

The only activity on I-66 since January 1, 1970 has been the completion of work authorized or approved prior to that date.

The instructional memorandum of the Federal Highway Administration, issued November 30, 1970, stated that an environmental impact statement under NEPA would be required on all projects which had not received design approval prior to February 1, 1971.

Design approval for I-66 was had January 21, 1971—Nevertheless the defendants in this case have stated in their

answer that regardless of the technical question of the applicability of NEPA to future actions, they intend to require the filing of an impact statement prior to further construction approval—Virginia is now preparing that statement.

The federal defendants have further assured the Court that they will give the impact statement, prior to approval of construction, the objective evaluation urged by the court in the Gillham Dam case, EDF v. Corps of Engineers, 2 ERC 1260.

Although it has not been made one of the issues here to be determined, it is well known that Virginia has employed a nationally known landscape architect to investigate the environmental effects of I-66 and that he is proposing noise abatement requirements that would make Arlington County quieter than it now is.

The Three Sisters Bridge is not a part of I-66—neither is the proposed connecting road, I-266. Some adjustments in the I-66-I-266 interchange will be required if I-266 is not built. They have been considered and approved.

Therefore, there is no justification or legal requirement for further delay in completing the construction of I-66.

The plaintiffs' suit will be dismissed as of this date.

The Clerk will send a copy of the dismissal order and of this memorandum opinion to all counsel of record.

/s/ Oren R. Lewis
United States District Judge

ORDER

Entered October 8, 1971

In accordance with the memorandum opinion of the Court this day filed herein, the above styled matter is hereby dismissed and stricken from the docket of this Court.

/s/ Oren R. Lewis
United States District Judge

APPENDIX D(1)

Federal-Aid Highway Act of 1958

§ 128. Public hearings

(a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic effects of such a location. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

(b) When hearings have been held under subsection (a), the State highway department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification.

APPENDIX D(2)

Federal-Aid Highway Act of 1968

§ 128. Public hearings

(a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway. Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered.

APPENDIX D(3)

National Environmental Policy Act of 1969

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws

of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have a impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and financing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

APPENDIX E

STIPULATION AS TO FACTS

Filed June 9, 1971

The parties hereto, by counsel, jointly agree that the statements contained herein are assumed to be true and correct for the purpose of the motions to dismiss and motion for judgment filed herein.

1. (a) The highway in this action is known as Interstate Route 66 and is a part of the Interstate System of Highways authorized by 23 U.S.C. 103. It runs from Interstate 81 near Strasburg, Virginia, through a portion of Fairfax County and Arlington County, Virginia, to the Potomac River, a distance of 75.4 miles, approximately 25 miles of which has been completed.

(b) The Virginia Department of Highways began preliminary studies for the location of I-66 through Fairfax County and Arlington County prior to 1958 and completed three studies regarding the location of the highway: to wit, (1) preliminary study and feasibility estimate for Virginia Route 66 dated April 1958 and a supplement to this study dated October 1958 by Consulting Engineers Howard, Needles, Tammen, and Bergendoff; (2) a report on I-66 by the Office of Planning of the Virginia Department of Highways dated October 25, 1958; (3) the location study of I-66 through Arlington County dated October 28, 1958, by Wilbur Smith & Associates. Copies of these studies are attached hereto as *Exhibits A-1, A-2, and A-3* and asked to be read as a part hereof.

(c) The Interstate System of highways is constructed by the States under a Federal grant on a 90-10 ratio—90% paid by the Federal Government and 10% by the States. The Federal program is presently administered within the U.S.

Department of Transportation by the Federal Highway Administration which was created in [illegible]. From [illegible] to [illegible] the program was administered by a Bureau of Public Roads within the Federal Highway Administration. From to [illegible] the highway program was administered by a Bureau of Public Roads within the Department of Commerce. While the names of the operating agencies have changed, the organizational structures, particularly in the field, have remained essentially the same. The Federal Highway Administration maintains an office in each State called the Division Office which is headed by a Division Engineer. The Division Engineer is under the supervision of a Regional Administrator (prior to [illegible], known as Regional Engineer) who covers several States and is directly responsible to the Federal Highway Administrator in Washington. The Division Engineer for Virginia is Harold C. King, who was appointed to the post in January [illegible], and who worked in this Division Office as Planning Engineer of the Northern Virginia Area from January [illegible] to May [illegible]. Mr. King's predecessor as Division Engineer was Mr. John Sullivan, who served as Division Engineer from [illegible] to December [illegible]. Division Engineer King's affidavit concerning the development of [illegible] is attached as *Exhibit* [illegible].

2. A public hearing was held in Arlington County on December [illegible], to consider a corridor for Route [illegible] in Arlington County. Four alternative routes were considered and discussed at this meeting. The meeting opened at [illegible] p.m. and closed at [illegible] with an estimated [illegible] persons present at the hearing. Plaintiff McCoy was present at the hearing. The Bureau of Public Roads Division Engineer and Regional Engineer were present. A [illegible] meeting was held on Saturday, September [illegible], before the members of the Arlington County Board with citizens and

State was the only route supported at the public hearing. Additional information was submitted by the Division Engineer to the Regional Engineer by memorandum dated May 22, 1959. *See Exhibit D-4.* The Regional Engineer on May 25, 1959, submitted this information to the Assistant Commissioner, Office of Engineering, Bureau of Public Roads, Washington, D.C., with the recommendation that line 2, the presently approved route, be approved. *See Exhibit D-5.* By memorandum of June 4, 1959, the Assistant Commissioner informed the Regional Engineer as follows:

> "In view of the statements made in the State's letter of May 28, Line 2, the so-called Fairfax Drive-Bluemont Drive corridor, as proposed by the State after consideration of the material presented at the public hearing held on October 29, 1958, and initially recommended by the State on February 20, 1959, may be approved subject to any required adjustments in the financing of improvements on the previously approved location which involved Federal-aid Interstate funds. The State may also be authorized to proceed with the necessary surveys to determine a detailed location for the ultimate improvement of Interstate Route 66." (*See Exhibit D-6*).

On June 26, 1959, the Division Engineer informed the Virginia Department of Highways that the so-called Fairfax Drive-Bluemont Drive Corridor, the presently proposed route, was approved June 4, 1959. *See Exhibit D-7.* A layout map showing the approved route from the Beltway to the Potomac River is attached as *Exhibit D-8.*

4. On March 19, 1959, the Virginia Department of Highways certified to the Federal Division Engineer that a public hearing had been held and consideration was given to the economic effects of the location of I-66. *See Exhibit E-1.* Also submitted was an eight page summary of written state-

ments submitted at the hearing or thereafter by 71 interested persons and groups. *See Exhibit E-2.*

5. A tape recording of the actual hearing was submitted by the Virginia Department of Highways to the Division Engineer of the Bureau of Public Roads on March 17, 1959 (*see Exhibit F-1*), which tape was reviewed by the Bureau of Public Roads, and has recently, since the institution of this suit, been reduced to writing, a copy of which is attached hereto as *Exhibit F-2* and asked to be read as a part hereof. Policy and Procedure, Memorandum having to do with public hearings and transcripts were issued at various relevant times, with the first issued August 10, 1956, attached hereto as *Exhibit F-3* and another issued June 16, 1959, attached hereto as *Exhibit F-4*. These were superseded by an issuance of January 14, 1969, attached hereto as *Exhibit F-5*.

6. On November 18, 1959, by letter, the Virginia Department of Highways submitted to the Division Engineer additional information reviewing the hearing and presenting additional consideration of the economic effects. *See Exhibit G-1.* The Division Engineer transmitted this on December 4, 1959, to his superior, the Regional Engineer of Hagerstown, Maryland. *See Exhibit G-2.* This material was transmitted to the Washington Office of the Bureau of Public Roads on January 6, 1960, and on February 17, 1960, the Assistant Commissioner, Office of Engineering, Bureau of Public Roads, Washington, D.C., informed the Regional Engineer that the State could be advised that on the basis of the State's letter of November 18, 1959, the public hearing held on October 29, 1958, fulfilled the requirement of section 128, title 23, U.S.C. *See Exhibit G-3.* On February 25, 1960, the Division Engineer informed the Virginia Department of Highways that on the basis of the State's letter of November 18, 1959, it had been determined that the

public hearing held on October 29, 1958, fulfilled the requirement of section 128, title 23, U.S.C., and no additional hearing was required. *See Exhibit G-4.*

7. (a) In 1961 and 1962 right-of-way acquisition was authorized for the five sections that comprised the total length of I-66 from the Beltway to Rosslyn. This initial acquisition was for six lanes. In 1965 the project was expanded to eight lanes. These authorizations, which permitted Federal funding for the costs to Virginia, were given by the Division Engineer of the Bureau of Public Roads in seven separate actions between January 12, 1961, and January 11, 1965. These same sections were placed under agreement in separate actions between June 18, 1962, and July 28, 1966, which allowed the State to be reimbursed for the right-of-way that was acquired under previous authorization. The project number with the project termini and original date of authorization to acquire (notice that the State of Virginia would be reimbursed for the right-of-way work, including appraisals and incidentals connected with right-of-way acquisition), and the original date of right-of-way agreement (notice that a specified amount of Federal funds is obligated and allocated for the project) are set forth herewith:

Federal Project Number	*Project Termini*	*Original Date of Authorization to Acquire*	*Original Date of Right-of-Way Agreement*
I-66-1(36)78 (Exhibit H-1)	I-66 from the intersection with Nash St. to the Virginia-D.C. State line.	1-12-61	6-18-62
I-66-1(38)74 (Exhibit S-2)	I-66 from 0.369 mile east Patrick Henry Dr. to Washington Blvd.	6-22-61	7-28-66

I-66-1(37)69 (Exhibit H-3)	I-66 from Fairfax County line to 0.359 mile east of west intersection Routes 29-211 (Sycamore Street).	6-27-61	6-3-64
I-66-1(45)69 (Exhibit H-4)	I-66 from 0.425 mile east intersection Route 1-495 to Arlington County line.	9-6-61	12-6-63
I-66-1(35)75 (Exhibit H-5)	I-66 from Washington Blvd. to N. Nash Street.	3-8-62	1-28-63
I-66-1(43)73 (Exhibit H-6)	I-66 from 0.359 mile east of west intersection Rts. 29-211 (Sycamore St.) to 0.369 mile east Patrick Henry Drive.	6-28-62	7-28-66
I-66-1(600) (Exhibit H-7)	W&OD Railroad Acquisition.	1-11-65	2-26-65

(b) In addition, the following utility relocation projects have been approved:

Project	*Company*	*Amount*	*Date*
I-66-1(37)69 (66-000-101 RW 201)	Washington Gas & Elec.	$ 96,500	4-4-66
I-66-1(43)73 (66-000-102 RW 201) (PE 101)	Arlington County Const.	14,420	8-8-66
	Arlington County Const.	10,057	8-9-65
	Arlington County Const.	12,391	10-9-64
	Arlington County Const.	1,992	10-9-64
	Arlington County Const.	26,450	3-17-69
		$ 65,310	
I-66-1(35)75 (66-000-102 RW 206)	VEPCO	25,573	6-9-66
	Arlington Co. Sewer	3,338	3-8-68
	Arlington Co. Sewer	8,754	5-13-68
	Washington Gas & Elec.	57,000	3-23-70
	Arlington Co. Water	220,000	3-23-70
		$314,665	
I-66-1(45)69 (66-029-103 RW 202)	C&P	11,430	8-13-64
	VEPCO	41,712	5-26-64
	VEPCO	34,317	7-16-64
		$ 87,459	

8. From the date of the location approval over 924 parcels of property have been acquired along the approved location of I-66 in Arlington County and Fairfax County at a cost of $28,670,123.07. In this corridor, 581 dwellings have been acquired, with 38 remaining to be acquired; 68 businesses have been acquired, with 1 remaining; 475 families have been relocated, with 153 remaining; 68 businesses have been relocated, with 12 remaining. The estimated cost to complete the acquisition of right-of-way is $5,329,876.93. These matters are more fully set out in the affidavit dated March 2, 1971, of the State Right-of-Way Engineer Alvah S. Mattox and attached as *Exhibit I*. The State of Virginia has expended $1,500,000 in preliminary engineering which will not be reimbursed by the Federal Government.

9. Beginning in 1961, there occurred a series of field inspections of the highway of I-66 to I-495 (Capital Beltway to Rosslyn) which inspections were jointly made by representatives of the State of Virginia and the Federal Bureau of Public Roads with sets of plans in hand. These inspections are documented by a series of letters dated June 23, 1961 (*Exhibit J-1*); June 13, 1962 (*Exhibit J-2*); August 21, 1963 (*Exhibit J-3*); May 19, 1966 (*Exhibit J-4*); March 11, 1963 (*Exhibit J-5*); and August 7, 1968 (*Exhibit J-6*). Each of these letters contain the following two paragraphs:

> "It is understood that two sets of plans were marked in the field to indicate the detailed recommendations of the inspecting party. One set of plans will be forwarded to your Design Division by your District Engineer and will constitute a record of our detailed recommendations, as well as those of your field representatives. Agreement has been reached in the field on all points except those which are discussed on the second page of this letter. We request your consideration of these points, or any other special features which are empha-

sized, and shall appreciate your further comments when appropriate.

"If you or your staff find it necessary to modify the final plans so as to differ from details upon which agreement was reached in the field, we shall appreciate your notifying this office so that we may have the opportunity of discussing the matter with you and reaching a satisfactory understanding."

On November 30, 1970, the Federal Highway Administration issued a draft Instructional Memorandum which is still in effect for the implementation of the National Environmental Policy Act of 1969 (P.L. 91-190), which stated that an environmental statement as required by section 102 of the Act would be required on all projects which received design approval after February 1, 1971. On January 6, 1971, Defendant Fugate wrote to Defendant King (*Exhibit J-7*) and suggested that the above letters be deemed to constitute design approval for the purpose of the draft Instructional Memorandum. Defendant King, by letter of January 21, 1971 (*Exhibit J-8*), concurred in Defendant Fugate's suggestion.

10. Plaintiff Arlington Coalition on Transportation was founded November 4, 1970, and currently has 350 individual dues paying members plus six civic associations. Plaintiff Arlingtonians for the Preservation of the Potomac Palisades was founded in 1951 and its members consist of the following civic groups:

The Parkway Citizens Association
North Highland Citizens Association
Riverwood Citizens Association
Bellvue Forests Citizens Association
Rivercrest Citizens Association
Gul Branch Citizens Association

The Arlington Chamber of Commerce was organized in 1939 and has been in continuous operation since that time. It has a present dues paying membership of 649 different firms, corporations or professional people who either work or do business in Arlington County, Virginia.

11. (a) Plaintiff Nordby purchased his home in 1966. Plaintiff Vera Koehler with her husband, purchased their home in Arlington in 1965. Plaintiff Harold McCoy purchased his home site in Arlington in 1940 and adjoining land in 1941. Plaintiff Ellen Snedden purchased her home in Arlington in 1960. Plaintiff McCoy has carried on extensive correspondence and held conferences with officials of the Virginia Department of Highways at various times since 1958. The other individual plaintiffs had information at the various times indicated that the I-66 route was proposed to pass through their general area: Koehler in October 1969, Nordby in November 1969, and Snedden in September 1960.

(b) The following named individual plaintiffs learned of an intention of the Virginia Highway Department to acquire some of their respective properties at the various times indicated: Vera Koehler, spring of 1970; Harold McCoy, early 1962; Raider Nordby, May 1970; Ellen Snedden, January 1970.

(c) At the various times indicated the following named individual plaintiffs received notice as to exactly what amounts of their respective properties would be acquired by the Virginia Highway Department in connection with I-66: Vera Koehler, September 1, 1970; Harold McCoy, August 13, 1970; Raider Nordby, October 19, 1970; and Ellen Snedden, November 1970.

(d) That beginning in 1961 and continuing to the present, the location of I-66 has been shown on the Arlington County General Land Use Plan, a copy of which is attached hereto as *Exhibit K*. Arlington County's planning regarding zoning, traffic, utilities, etc., has relied upon the location of I-66 as approved. See affidavit of Richard Arms, former Planning Director of Arlington County, *Exhibit K-1*. Extensive newspaper coverage of the I-66 project has been provided in local newspapers since 1958 and the general route or corridor has been published in local newspapers on many occasions since that date. *See Exhibit K-3*. Numerous businesses have located near the corridor since 1959, relying on the location of I-66 as approved. *See Exhibit K-1*.

12. A public hearing was held in Arlington County on September 29, 1970, pursuant to notice published in a local newspaper under date of August 19, 1970, by the Virginia Department of Highways to consider "the proposed design of Route 66 from 0.069 mile east of Washington Boulevard (Route 237) to 0.109 mile east of Lynn Street (in Rosslyn), in Arlington County." *See Exhibit K-2*. This public hearing was continued on December 7, 8 and 9, 1970.

13. There have been no other public hearings pursuant to Federal law held in Arlington County on other segments of I-66 in Arlington County, except those mentioned in these stipulated facts.

14. The land of individual plaintiffs Koehler, McCoy and Nordby lies within the areas affected by the project which was the subject of public hearings in September and December 1970. The land of individual plaintiff Snedden lies in an area not affected by the public hearings held in December 1970.

15. (a) The amount of acreage of Bon Air Park to be taken for use in connection with I-66 is 9.6 acres. The portion of this park which will be utilized for the highway is designated on the Arlington County General Land Use Plan Map, adopted August 12, 1961, with amendments through January 15, 1964, as open space and to be used for the specific purpose of locating a highway thereon. *See Exhibit K*. The tract was acquired by Arlington County for park and highway purposes. See Affidavit of A. R. Ratcliff, *Exhibits L and L-1*. All of the tract in question is presently being used as a park.

(b) The acreage of Spout Run Parkway to be taken for I-66 is approximately 5 acres. If the proposed I-266 route to the Three Sisters Bridge is built, the 31.6 acres of Spout Run Parkway would be conveyed to the Virginia Department of Highways, of which 13.97 acres will be utilized for I-266 roadway.

16. The Virginia Department of Highways has agreed to provide funds to replace the 31.6 acres of parkland in Spout Run, and Arlington County and the National Park Service have concurred, a copy of the Arlington County Board's Resolution of Approval is attached hereto as *Exhibit M* and is asked to be read as a part hereof. The 31.6 acres would be replaced by acquisition of tracts located immediately adjacent to the George Washington Parkway. *See Exhibit M-1,* letter from the Department of Interior to the Arlington County Manager dated January 13, 1970. Conditional approval of this plan, with the promise of Federal funding, was given in a letter from Mr. F. C. Turner, Federal Highway Administrator, to Commissioner Fugate on October 2, 1969, *Exhibit M-2*. See also Pages 7 & 8 of Arms affidavit, *Exhibit K-1*.

17. Construction of the Three Sisters Bridge is presently enjoined by an order of the U.S. District Court of the District of Columbia pending the holding of a design hearing and resolution of certain safety considerations. This design hearing was held on December 14, 15, & 16, 1970, and the District of Columbia submitted the plans for the Bridge for approval to the Federal Highway Administration on April 2, 1971. Appeals from the injunction have been taken by all parties. In the plaintiff's appeal, it is contended that a new determination under 23 U.S.C. 138 is required and that a new location hearing is required.

18. If no bridge is built at the Three Sisters site and I-266 is not constructed, some changes in the design of I-66 would be necessary, including as a minimum the elimination of the connections between I-266 and I-66 with attendant ramps and approaches. Alternate proposals have been considered and approved by the Division Engineer for the construction of I-66 without I-266 if Three Sisters Bridge is not built. This approval was given in a letter of August 7, 1968. See *Exhibit J-6*. The Virginia Department of Highways projects the average daily traffic count to 1990 from Lee Highway near Kirkwood Road to Rosslyn to be 66,700 (both ways), with the construction of I-266. This projection without the construction of I-266 is 106,760 (both ways). If I-266 is not built, the alternate design of I-66 from Lee Highway to Rosslyn calls for construction of two additional lanes. In the opinion of the Virginia Department of Highways the alternate design will provide adequate capacity for the larger traffic flow (106,760).

19. The following project agreements have been executed by the Federal Bureau of Public Roads authorizing preliminary engineering to commence by Virginia Department of Highways:

(a) Preliminary engineering on Interstate Route 66, from 0.57 mile east of the intersection with Route 123 to the west intersection with Routes 29 and 211; agreement dated January 14, 1960.

(b) Preliminary engineering on Interstate Route 66 from the west intersection with Routes 29 and 211 to the west end of the proposed Constitution Avenue Bridge; agreement dated January 14, 1960.

20. There have been the following construction projects completed on I-66 segment in Arlington County:

(a) Construction on Interstate Route 66 from 0.298 mile east of Lynn Street to the west end of Theodore Roosevelt Bridge, authorized October 3, 1962.

(b) Construction on Theodore Roosevelt Bridge over Little River of superstructure, authorized January 14, 1963.

(c) Construction on Theodore Roosevelt Bridge over Little Creek of substructure, authorized January 15, 1963.

(d) Construction of median barrier and guard rail on Theodore Roosevelt Bridge, authorized December 18, 1967.

(e) Construction on Interstate Route 66, a 10′x10′ box culvert under Lee Highway near Kirkwood Road, authorized July 17, 1968. The culvert construction is located 950 feet from that portion of lands administered by the National Park Service as part of the Spout Run Parkway. A plan sheet showing location of this project is attached as Exhibit M-3.

21. Plans, estimates and specifications were submitted and approved by the Bureau of Public Roads on April 15, 1964,

and approved July 17, 1964, on that part of I-66 that runs from the Beltway to within one-half mile of the Arlington County line. The Virginia Department of Highways advertised on July 22, 1964, and received construction bids on this project on August 26, 1964. The bids were never opened due to the uncertainty of the acquisition of the W&OD Railroad right-of-way at that time and necessity of revising the number of lanes needed due to elimination of the use of the median for rapid transit, because of the expiration of function of the National Capital Transit Authority.

22. Defendants estimate construction costs will be $55 million from Beltway to Bridge and the Department tabulations of construction cost indices compiled for the calendar year 1970 indicate that the construction cost index statewide is up 16 percent over 1969.

23. (a) A January 1959 report of the National Capital Planning Commission and the National Capital Regional Planning Council on the Mass Transportation Survey of Washington Region, states that in order to meet anticipated future transportation needs along this corridor, a bus and freeway development would be needed, and includes a hypothetical plan for rail and freeway use in this corridor. *See Exhibit N.* A study called "A Policies Plan for the Year 2000—the Nation's Capital," issued May 8, 1961, contains a sectional diagram showing combination freeway and transit system in the I-66 corridor. *See Exhibit N-1.*

(b) A report dated June 30, 1966, called "The Regional Development Guide, 1966-2000," on pages 58 & 59 thereof, has maps of the Washington Metropolitan Area, indicating that a rail transit and highway will occupy the presently designated corridor of I-66 through Arlington County. Copy of these maps attached as *Exhibit N-5.* In the report, at

creased from 758 thousand in 1960 to 997 thousand in 1968. The District of Columbia located portion of these jobs has declined from about 63 percent in 1960 to about 52 percent in 1968 on an absolute increase from 483 thousand to 515 thousand. The Virginia located portion of these jobs has increased from about 17 percent to about 23 percent on an absolute increase from 130 thousand to 225 thousand. *See Exhibit N-13.* "Travel to Work," Tables I & II.

(b) In 1960 a total of 111.1 thousand persons lived in Virginia suburbs and held their jobs in Virginia suburbs. In the same year 90.1 thousand persons that lived in Virginia suburbs commuted to the District of Columbia for their employment. In 1968 a total of 173.9 thousand persons lived in Virginia suburbs and held their jobs in Virginia suburbs. In the same year 104.1 thousand persons lived in the Virginia suburbs and commuted to the District of Columbia for their employment. *See Exhibit N-13.* The projected changes in availability of jobs, by jurisdiction, indicate that the number of jobs in the Washington Metropolitan Area will increase from 1,270,400 jobs in 1970 to 2,731,100 jobs in the year 2000. The District of Columbia portion of these jobs in 1970 is 662,000; in the year 2000 it will be 1,020,000, an increase of 54.1 percent. The Virginia suburbs portion of the total in 1970 is 301,000 and in 2000 will increase to 877,000 or 191.4 percent. *See Exhibit N-12.* Also see *Exhibit N-11* on changes from 1968 to 1970.

(c) In 1970 the actual count of automobiles crossing the Roosevelt Bridge in a twenty-four hour period was 48,080 with 26,040 being eastbound and 22,040 being westbound. In the morning rush hour on Roosevelt Bridge 5,320 automobiles were eastbound and 1,192 westbound. The 1970 actual count of automobiles crossing the five center city

bridges was 331,810. The 1959 projection of the Mass Transportation Survey, page 51 (*Exhibit N*) for total daily crossings (both ways) for 1970 was 550,000 without improved rapid transit and 500,000 with improved transit. See Fig. 38 of *Exhibit N*.

(d) Forecasts of average daily traffic for the year 1975 for the use of the proposed I-66 route in north Arlington near Rosslyn were made by the Virginia Department of Highways in 1958 and are contained in *Exhibit O-1*. (Especially Blueline with Chantilly Access). A forecast of average daily traffic for the year 1990 for the use of the proposed I-66 route in north Arlington near Rosslyn was made by the Virginia Department of Highways in 1969 and is contained in *Exhibit O-2*. An analysis of traffic entering the District of Columbia was made in 1968 by the National Capital Planning Commission and is contained in *Exhibit O-3*. Volumes of persons and traffic actually entering the District of Columbia in 1968 were studied in 1969 by the National Capital Region Transportation Planning Board as shown in *Exhibit O-4*.

(e) The D.C. freeway plan of 1959 is shown in *Exhibit N*, figure 40. Changes made to this plan in 1962 by the National Capital Transportation Agency are described and shown in *Exhibit O-5*. The 1968 national capital major thoroughfare plan is shown in *Exhibit O-6*. The current recommended freeway and parkway network of the D.C. Highway Department is shown in *Exhibit O-7*.

(f) Arlington County has generated new commercial developments creating new centers of employment of significant size. The Development along Jefferson Davis Highway in south Arlington, known as Crystal City, since 1964 has created office space amounting to over five million square

feet. See Arlington County publication "Office Buildings" (1968); *see Exhibit O-9.*

(g) The Crystal City development has to date about 20,000 filled positions of employment. There is housing in the same area for about 3,200 persons.

(h) The Washington metropolitan area, including Arlington County, has developed an air pollution measuring system and adopted some standards for the control of air pollution. See Affidavit of Dr. Cal Cohn and accompanying exhibits, attached hereto as *Exhibit O-10.*

(i) A committee of the Arlington County Planning Commission has recently expressed its concern about the diminishing supply of open space in the country and this committee has recommended that the country purchase land to increase the amount of publicly owned open space. See Report of the Open Space Committee of the Arlington County Planning Commission (March 2, 1971), attached hereto as *Exhibit O-11.* This report states that approximately 98 percent of the land in Arlington County, exclusive of that owned by the Federal Government, is fully developed. The word "developed" in the previous sentence includes the approximately 650 acres of land in Arlington zoned S3A, open space currently devoted to park use. If the parkland were considered "non-developed," the figure for improved land in Arlington would be approximately 90 percent. None of the above cited percentages have been documented as to the method of computation. The Arlington County Planning Commission has taken no action to adopt or accept any part of the said report.

(j) That the Fairfax County Board of Supervisors has consistently planned the proposed location of Rt. 66 upon its comprehensive plans since 1959.

25. Lee Highway (29-211) will be expanded at two points in Arlington County and divided and expanded at one of these points. Thus, beginning at the west side of the Kirkwood Road-Lee Highway intersection and extending for 1,638 feet westerly along Lee Highway, Lee Highway will be expanded from three to six lanes. Beginning at a point just west of N. Uhle Street, and continuing to N. Lynn Street in Rosslyn, Lee Highway will be separated with east bound traffic lanes being south of I-66 proper (essentially along the existing location of Lee Highway) and its west bound lanes will be north of the actual I-66 roadway, crossing Rt. 66 at N. Courthouse Road. Each of these traffic roadways on Lee Highway will consist of four lanes from near N. Uhle Street to N. Lynn Street in Rosslyn. Right-of-way acquisition approval was given to one segment on January 12, 1961, and on the other on April 19, 1962 (*see Exhibits H-1 and H-8*).

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-218

DOUGLAS B. FUGATE, COMMISSIONER, DEPARTMENT OF HIGHWAYS, COMMONWEALTH OF VIRGINIA,
PETITIONER

v.

ARLINGTON COALITION ON TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS

Respondent Arlington Coalition on Transportation brought this action on February 19, 1971, to enjoin various federal and state officials from further planning and land acquisition for a six-mile section of Interstate Route 66 through Arlington County, Virginia. It contended that the defendants had acted illegally in continuing the planning and land acquisition for the highway without having first filed a final detailed environmental impact statement on the project pursuant to Section 102(2)(C) of the National Environmental Policy Act of 1969, 83 Stat. 852, 853,

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42 U.S.C. 4332(2)(C). It also contended that the defendants had failed to make the necessary findings concerning injury to parklands caused by the project, as required by Section 4(f) of the Department of Transportation Act of 1966, 80 Stat. 931, 934, as amended, 49 U.S.C. 1653(f), and Section 18(a) of the Federal-Aid Highway Act of 1968, 82 Stat. 823, 23 U.S.C. 138.[1] Furthermore, respondent alleged that the requirements of 23 U.S.C. 128(a) compelled the state officials to hold a new public hearing on the location of the highway corridor before further action could be taken on the road.

Before trial, the federal defendants declared their intention not to authorize construction of the road until the requisite impact statement, encompassing both a NEPA review of the environmental impact and the "section 138–4(f)" findings, had been filed with the Council on Environmental Quality.[2] On cross-motions for summary judgment, the district court dismissed the complaint on October 8, 1971 (Pet. App. 30–43).

On November 24, 1971, the court of appeals granted the complainant's motion for an injunction pending appeal (Pet. App. 29). In an opinion dated April 4, 1972, the court of appeals reversed the district court's judgment and ordered that court to grant "injunctive

[1] Section 4(f) of the Department of Transportation Act is virtually identical to Section 138 of Title 23. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402.

[2] This commitment was reaffirmed in an affidavit submitted by federal officials to the district court.

and such other relief as may be necessary" (Pet. App. 28).

The court held that Arlington I–66 is subject to the requirements of Section 102(2)(C) of the National Environmental Policy Act (NEPA), although planning for the highway, as well as land acquisition, had commenced and progressed substantially prior to the date that NEPA became effective. The court stated that its holding did not give retroactive effect to NEPA, because Arlington I–66 had not yet reached the point where the costs of altering or abandoning the project would definitely outweigh whatever benefits might flow from an application of the statutes. The court held this to be the proper test, in light of the directive in Section 102 that NEPA be applied "to the fullest extent possible."

Similarly, the court reasoned that since Section 102 of NEPA requires that "to the fullest extent possible * * * [the] public laws of the United States shall be interpreted and administered in accordance with the policies" set forth in the Act, Section 4(f) of the Department of Transportation Act and Section 18(a) of the Federal-Aid Highway Act of 1968, 23 U.S.C. 138, also apply to this project initiated before their effective date. Therefore, the court held, the determinations with respect to the use of parklands required by those sections are necessary before the project may proceed.

Finally, the court also relied on the above language of Section 102 in requiring the application to this

project of the 1968 amendment to Section 128 of Title 23. Accordingly, the court ruled that the public hearing held before Arlington I-66 received federal location approval in 1958 was now insufficient, since, as then required, it dealt only with economic effects. The court directed a new public hearing, to consider also the social, environmental, and urban planning aspects of the highway's location, as required by the 1968 amendment of Section 128, and also to consider the changes in economic effects since the prior hearing (Pet. App. 23).[3]

1. The court's holdings with regard to NEPA and Sections 4(f) and 138 coincide with the earlier determination by the requisite federal officials to file the environmental statements required by those provisions, and in the circumstances these holdings are not seriously presented in the petition as a basis for further review (see Pet. 11). Although the standard articulated by the court below to determine the applicability of NEPA and the highway statutes to on-going projects is somewhat vague and potentially troublesome, it cannot be said that the application of those statutes here is in conflict with decisions of other courts of appeals under differently (and, we believe, prefer-

[3] The petition also challenges the refusal of the court below to apply the doctrine of laches in this case. We did not argue that defense below, and we do not believe the question of the doctrine's applicability to the particular facts of this case warrants review by this Court.

ably) articulated standards.[4] As the court below noted, Arlington I–66 has not received final federal approval, contracts have not been let, and construction has not yet begun. In any event, since federal officials have now undertaken to comply with these statutes with respect to this project, there is no need for further review of this aspect of the case.

2. The decision by the court of appeals that a new public hearing must be held on the location of Arlington I–66 is more troublesome. Reopening of the hearing process with respect to the thousands of federal-aid highway projects underway throughout the country would cause significant administrative difficulties and, in our view, was not required by Congress. However, because of the particular facts of this case, including the possibility of very substantial changes in the relevant factors since 1958, we believe the decision below does not establish a precedent of sufficiently general applicability to require further review by this Court. In our view, the interests of reaching a proper

[4] See *Pennsylvania Environmental Council, Inc.* v. *Bartlett*, 454 F. 2d 613 (C.A. 3); *Wildlife Preserves, Inc.* v. *Volpe*, 443 F. 2d 1273 (C.A. 3); *Concerned Citizens of Marlboro* v. *Volpe*, 459 F.2d 332. (C.A. 3); *Lathan* v. *Volpe*, 455 F.2d 1111 (C.A. 9). See also *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402; *Calvert Cliffs' Coord. Com.* v. *United States A. E. Com'n*, 449 F.2d 1109 (C.A. D.C.). Furthermore, the holding by the court below that the Secretary of Transportation may take into account the previous investment in the proposed route (Pet. App. 15) is a realistic recognition of the difficulties created by applying these statutes to on-going projects such as Arlington I–66.

and prompt final decision on this project will best be served by compliance with the decision below, and the federal defendants will, accordingly, require the petitioner to hold the necessary hearing.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-218

DOUGLAS B. FUGATE, Commissioner,
Department of Highways,
Commonwealth of Virginia,

Petitioner

v.

ARLINGTON COALITION ON
TRANSPORTATION, et al.,

Respondents

ON PEITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

The petition for certiorari and the memorandum filed by the Solicitor General adequately set forth the nature of the case and the questions presented by the petition.

REASONS FOR DENYING THE WRIT

The decision of the court below was correct and does not warrant review by this Court.

1. *Laches.* Petitioner erroneously asserts that the court of appeals held the defense of laches may never be asserted in "ecology cases". In fact the court decided only that while this action might have been brought about a year earlier the public interest in preserving the environment (and, we may add, in ensuring that public officials observe the laws adopted by the Congress) led it to reject the defense. This was no more than a familiar instance of a court of equity refusing to apply an equitable defense where other public interest considerations suggested the desirability that the case be decided on the merits. Laches "varies with the peculiar circumstances of each case, and is not, like the matter of limitations, subject to an arbitrary rule," *Halstead v. Grinnan*, 152 U.S. 412, 417 (1894). Whether the court below correctly exercised its discretion in this regard hardly deserves the attention of this Court.

2. *The National Environmental Policy Act Statement and the "Parkland" Determination.* The allegations of the complaint that the defendants were proceeding unlawfully toward the construction of the highway without filing the impact statement required by Section 102(c) of the National Environment Policy Act of 1969, 42 U.S.C. 4332(c) and without making the necessary findings that must precede the use of parkland for Federal highway purposes required by Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. 1653(f), were met by the announcement of the respondents that while they believed the statutes to be inapplicable, they would nevertheless comply with these

provisions. The determination of the court of appeals that compliance with these statutes was obligatory thus had only very limited practical effect. We agree with the Solicitor General that the application of these statutes by the court below to projects begun but not completed is not appreciably different from how they have been applied by other courts of appeals, although we disagree with his characterization of the formulation of the applicable principles by the court as vague and potentially troublesome. But even if the articulation of the governing principles might be a matter of sufficient importance to warrant consideration by this Court it should await presentation in a case in which the decision will affect the parties in a more concrete way.

3. *Public Hearings.* The petition asserts that the ground on which the court of appeals ordered that a new public hearing must be held pursuant to Section 128 of the Federal Aid Highway Act, 28 U.S.C. 128, was incorrect. While we can hardly deny that the issue is an important one, this case is not a good one for its resolution. As the Solicitor General points out the original Section 128 hearing was held in 1958 and although highways are not constructed in a week's time, a delay of 14 years before any construction begins is extraordinary. The statutory scheme contemplates not just a hearing but one that is meaningful and the anticipated impact in 1958 of a projected highway through a rapidly changing urban community relates only remotely to the actual impact in 1972. Review by this Court would be likely to involve consideration of alternative grounds to support the decision below to at least as great an extent as the grounds relied upon by the court of appeals. This appears also to be the view of the

Solicitor General and his memorandum states explicitly that the Department of Transportation will require compliance with the decision below. This would seem to eliminate any purpose of review by this Court.

Respectfully submitted,

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October 5, 1972